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Supreme Court, U.S.
FILED

No. 10-578 OCT 29 2010

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In The

Supreme Court of the United States

WAGONER COUNTY RURAL
WATER DISTRICT NO. 2, *et al.*,

Petitioners,

v.

GRAND RIVER DAM AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960), the Grand River Dam Authority (GRDA), an agency of the state of Oklahoma, claimed a vested interest in the waters of the Grand River and that such interest was private property. 1959 WL 101255 (U.S.) GRDA sought to trace title in the waters of the Grand River to itself, through the Cherokee Tribe. *Grand River Dam Authority* at 233-34. This Court rejected GRDA's claim citing *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 87-88 (1922), which held "[T]he title of the Indians grows out of a federal grant when the Federal government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and if the bed of a nonnavigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted a divesting of the title." *Grand River Dam Authority* at 233.

QUESTION PRESENTED – Continued

In *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 913 (10th Cir. 2008), the Court held that it is well-established that Oklahoma does not enjoy an ownership interest in water resources located in the state, citing *Sporhase v. Nebraska*, 458 U.S. 941, 950-52 (1982). This Court concluded that state ownership over water resources is a legal fiction. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 951 (1982).

Oklahoma has declared ownership to itself in the waters of the Grand River under the authority of Oklahoma Statute, Title 82, Section 862.

Whether The Grand River Dam Authority, An Agency Of Oklahoma, Can Declare Ownership Of The Waters Of The Grand River To Itself Pursuant To An Oklahoma Statute.

LIST OF PARTIES

The names of the Petitioners are:

Wagoner County Rural Water District No. 2,
Wagoner County Rural Water District No. 7,
Wagoner County Rural Water District No. 9,
Cherokee County Rural Water District No. 11,
Peggs Water Company, and
Tri-B Nursery, Inc.

The name of the Respondent is:

Grand River Dam Authority, an agency of the state of Oklahoma.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Wagoner County Rural Water District No. 2, Wagoner County Rural Water District No. 7, Wagoner County Rural Water District No. 9, Cherokee County Rural Water District No. 11, Peggs Water Company, and Tri-B Nursery, Inc.. petition the Court for a Writ of Certiorari to review a final judgment of the Court of Civil Appeals of Oklahoma entered May 7, 2010 affirming a district court of Craig County, Oklahoma dismissal of Petitioners' state court petition and final judgment of the Oklahoma Supreme Court entered on September 20, 2010 denying Petitioners' timely filed Petition for Certiorari for review of the decision of the Court of Civil Appeals.

OPINIONS BELOW

The opinion of the district court of Craig County, Oklahoma dismissing Petitioners' state court petition is not reported and is included in the Appendix. App., *infra*, at 20a. The opinion of the Court of Civil Appeals of Oklahoma (Fischer, Wiseman, and Barnes, JJ.) affirming the district court's dismissal of the Petitioners' state court petition is reported at ___ P.3d ___, 2010 WL 4058493 (Okla. Civ. App. Div. 2), 2010 OK CIV APP 95, and is included in the Appendix. App., *infra*, at 1a. The judgment of the Supreme Court of Oklahoma denying Petitioners' Petition for Certiorari is not reported and is produced in the Appendix. App., *infra*, at 23a.

STATEMENT OF JURISDICTION

The judgment of the Court of Civil Appeals of Oklahoma (Fischer, Wiseman, and Barnes, JJ.) affirming a district court dismissal of the Petitioners' state court petition was entered on May 7, 2010. App., *infra,* at 1a. The judgment of the Oklahoma Supreme Court denying Petitioners' Petition for Certiorari was entered on September 20, 2010. App., *infra,* at 23a. Title 12, Oklahoma Statutes, Ch. 15, App. 1, Rule 1.13 forbids a motion for rehearing of a denial of a Petition for Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, cl. 3, of the United States Constitution

> "The Congress shall have Power. . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Oklahoma Statute, Title 82, Section 862

> The district shall have and is hereby authorized to exercise the following powers, rights and privileges: (a) To control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district; . . .

(For the complete text of Title 82, Section 862, see App., *infra*, at 25a).

STATEMENT OF THE CASE

GRDA was created by the Oklahoma Legislature in 1935 pursuant to 82 O.S. § 861, *et seq.* which conferred on GRDA the right "[t]o control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district. . . ." 82 O.S. § 862, App., *infra*, at 25a.

After its creation, GRDA surveyed the Grand River and adopted a plan for the creation of three dams along the Grand River at Pensacola, Markham Ferry and Fort Gibson. *Grand River Dam Authority v. United States*, 175 F.Supp. 153, 155 (1959). By 1940, GRDA had constructed the Pensacola Dam and had acquired lands, easements and rights of way and had constructed facilities for the connection of the Pensacola project with the dams contemplated at Markham Ferry and Fort Gibson. *Id.* However, before GRDA could build the Fort Gibson Dam, the United States Congress passed the Flood Control Act of 1941 which authorized the construction of three dams along the Grand River by the U.S. *Id.* The U.S. undertook the construction of the Fort Gibson Dam on its own and completed its construction in 1950. *Id.*

GRDA owns and operates the Pensacola Dam and Markham Ferry Dam situated on the Grand River. *United States v. Grand River Dam Authority*, 363 U.S. 229, 230 (1960). The U.S. acting through the U.S. Army Corps of Engineers owns and operates the Fort Gibson Dam. *Id.*

Four of the Petitioners appropriate water directly from the Fort Gibson Reservoir (i.e., water impounded by the Fort Gibson Dam and standing on land owned by the Army Corps of Engineers). Petitioner Cherokee County Rural Water District No. 11 appropriates water from a stream which passes over and through its land and flows into the Fort Gibson Reservoir. Petitioner Peggs Water Company appropriates groundwater from a water well on its own land. App., *infra*, at 44a. None of the Petitioners appropriate water from any point above where the Grand River enters the Fort Gibson Reservoir or any water standing on land owned by GRDA.

In *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960), GRDA contended it could trace title to the waters of the Grand River to itself. This contention was rejected by this Court. GRDA now maintains that it derives ownership of the waters of Grand River through an Oklahoma Statute, Title 82, § 862. App., *infra*, at 25a.

Petitioners raised a federal question and the issue of federal ownership and/or superior control over the water being taken by Petitioners directly from water impounded on federal land or flowing

across federal land, with the trial court. App.. *infra*, at 41a-42a, and 45a-47a. Petitioners' state court petition was dismissed by the district court. App., *infra*, at 20a-21a. Petitioners appealed the order of dismissal. The Court of Civil Appeals of Oklahoma (COCA) addressed Petitioners' federal question arguments relative to the issue of federal ownership and control over the waters of the Grand River. App., *infra*, at 6a-13a. The COCA opinion (App., *infra*, at 1a) framed the issue as "[T]he dispositive issue in this appeal requires a determination of the ownership of the water sold by the GRDA to the Water Districts." App., *infra*, at 4a. COCA decided this dispositive issue by stating " . . . [t]he fundamental right to the water of the Grand River, including that water within the Fort Gibson reservoir, *belongs to the State of Oklahoma* and has been transferred to the GRDA. The Water Districts therefore fail to establish that the United States has the right to sell the water at issue." App., *infra*, at 13a-14a (emphasis added). In their Petition for Certiorari filed with the Oklahoma Supreme Court (App., *infra*, at 53a.), Petitioners contended state ownership of stream water and groundwater was directly contrary to *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 951 (1982). App., *infra*, at 62a-63a. Petitioners asserted in their state Petition for Certiorari that COCA had decided a federal question in a way that was not in accord with applicable decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals, citing *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 951 (1982) and *Tarrant Regional Water Dist. v.*

Sevenoaks, 545 F.3d 906, 913 (10th Cir. 2008). App., *infra*, at 54a, 62a-63a, and 65a.

REASONS FOR GRANTING THE WRIT

I. THE STATE OF OKLAHOMA THROUGH ITS AGENCY, THE GRAND RIVER DAM AUTHORITY, HAS DECLARED ITSELF THE OWNER OF THE WATERS OF THE GRAND RIVER CONTRARY TO SETTLED LAW EXPRESSED IN *HUGHES v. OKLAHOMA*, 441 U.S. 322 (1979) AND *SPORHASE v. NEBRASKA, EX REL. DOUGLAS*, 458 U.S. 941 (1982)

The Court of Civil Appeals of Oklahoma (COCA) stated "[T]he dispositive issue in this appeal requires a determination of the ownership of the water sold by the GRDA to the Water Districts." App., *infra*, at 4a. COCA held " . . . [t]he fundamental right to the water of the Grand River, including that water within the Fort Gibson reservoir, *belongs to the State of Oklahoma* and has been transferred to the GRDA. The Water Districts therefore fail to establish that the United States has the right to sell the water at issue." (emphasis added) App., *infra*, at 13a-14a. This conclusion is directly contrary to decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals which have stated that a state does not possess an "ownership interest" in the water resources located within its boundaries. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 951 (1982)

and *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 913 (10th Cir. 2008).

COCA has confused the State's police power to regulate the use of nonnavigable waters within the State with an ownership interest in the water. Ownership would allow the State the power to prohibit removal of such water from the state and sell the water. COCA cited to *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) (App., *infra*, at 7a) for the proposition that a state "owns" the superior right to nonnavigable water. Although *Hudson County* does articulate that the public has an interest in the state maintaining the rivers within the state, the case does not stand for the proposition that a state "owns" the water flowing in nonnavigable streams within its boundaries.

Hudson County does not support the theory of state ownership because it is based on the Supreme Court's earlier decision in *Geer v. Connecticut*, 161 U.S. 519 (1896). "*Geer*, which sustained a Connecticut ban on the interstate transportation of game birds captured in that State, was premised on the theory that the State owned its wild animals and therefore was free to qualify any ownership interest it might recognize in the persons who capture them." *Sporhase*, 458 U.S. at 950 (1982).

Hughes v. Oklahoma, 441 U.S. 322 (1979) expressly overruled *Geer*. The *Hughes* Court "traced the demise of the public ownership theory and definitively recast it as 'but a fiction expressive in legal shorthand

of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" *Sporhase*, 458 U.S. at 951 (1982).

In *Hughes*, the owner of a commercial minnow business in Texas was arrested for transporting natural minnows seined from the waters of Oklahoma to Texas for resale in violation of an Oklahoma statute. *Hughes*, 441 U.S. at 323-24. Hughes challenged the statute as unconstitutional because it was repugnant to the Commerce Clause. *Id.* at 324. The Petitioners here challenge the COCA judgment and its interpretation of 82 O.S. § 862 as also being repugnant to the Commerce Clause.

In reversing the decision of the Oklahoma Court of Criminal Appeals this Court expressly overruled *Geer* and extinguished the concept of sovereign ownership or common ownership over natural resources such as wild game. This Court noted: "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose." *Hughes*, 441 U.S. at 327.

Hughes noted that the view of the *Geer* dissenters became the predominant view in subsequent cases. *Id.* at 329. For example, in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), this Court rejected the argument that Virginia's "ownership" of fish swimming in its territorial waters empowered the state to forbid fishing by federally licensed ships owned by

nonresidents while permitting residents to fish. In reaching this conclusion, this Court explicitly embraced the analysis of the *Geer* dissenters stating:

> "A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. . . . *Geer v. Connecticut*, 161 U.S. 519, 539-540, 16 S.Ct. 600, 608, 40 L.Ed. 793 (1896) (i.e., Field, J., dissenting). The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'"

Hughes, 441 U.S. at 334-35.

Pursuant to this authority, neither Oklahoma nor GRDA owns the water flowing within the Grand River nor its tributaries (nor groundwater) until such water has been reduced to physical possession by Oklahoma or GRDA. Here, four of the Petitioners take water impounded by the Fort Gibson Dam and standing on federal land. One Petitioner takes water from a flowing tributary of the Grand River and one Petitioner takes groundwater. GRDA has not reduced

to its possession any of the water taken by the Petitioners.

This Court revisited the state "ownership" theory in the context of groundwater in *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 950 (1982). *Sporhase* involved an appeal from the Supreme Court of Nebraska relating to a Nebraska statute that imposed a reciprocity requirement on groundwater that was intended to be transported from Nebraska to another state. *Id.* at 941. The Nebraska Supreme Court found groundwater not to be an article of commerce relying on *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). (COCA relied on *Hudson* for the proposition that Oklahoma owns the waters within its boundaries. App., *infra*, at 7a.) This Court rejected the Nebraska Supreme Court's conclusion that groundwater was not an article of commerce based on its prior decisions that state ownership was "but a fiction expressive in legal shorthand of the importance that a state have power to preserve and regulate the exploitation of an important resource." *Sporhase*, 458 U.S. at 951.

Following these decisions, the issue of Oklahoma's claim to ownership of waters within the state arose again in *Tarrant Regional Water Dist. v. Herrmann*, 2007 WL 3226812 (W.D.Okla. 2007). In *Tarrant*, a Texas water district brought suit against members of the Oklahoma Water Resources Board (OWRB) seeking a declaration that certain laws limiting the export of water out of the state of Oklahoma were invalid because they were preempted

by the Red River Compact and violated the Commerce Clause of the United States Constitution. *Id.* at *1.

The OWRB moved to dismiss. The district court denied the motion holding that although Oklahoma has a special interest in managing the state's water resources, that interest is not properly grounded in a concept of state ownership of the water. *Id.* at *6.

On appeal, the OWRB argued that invalidating the anti-export laws of Oklahoma would encroach on Oklahoma's ownership interests in its natural resources. *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 913 (10th Cir. 2008). Rejecting this argument, the Tenth Circuit held: "It is also well-established that Oklahoma does not enjoy an 'ownership interest' in water resources located in the state. *See Sporhase v. Nebraska,* 458 U.S. 941, 950-52, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982)." *Tarrant Regional Water Dist.*, 545 F.3d at 913.

Here, COCA concluded that " . . . the fundamental right to the water of the Grand River, including that water within the Fort Gibson reservoir [situated on the land owned by the Army Corps of Engineers], belongs to the State of Oklahoma and has been transferred to GRDA." App., *infra*, at 13a. This conclusion conflicts with the decisions of this Court and the Tenth Circuit Court of Appeals. Oklahoma does not own the water within its boundaries which it has failed to reduce to its possession. It lacks the power to sell water it does not own. Moreover, Oklahoma lacks the power to sell water which the Petitioners have reduced to their possession or which stands on or

beneath the land of others (e.g., United States). Because the decision of COCA is in direct conflict with settled law expressed by this Court, the COCA decision must be reviewed and reversed.

II. OKLAHOMA'S CLAIM TO OWNERSHIP OF GROUNDWATER IS IN CONFLICT WITH SETTLED LAW EXPRESSED IN *SPORHASE v. NEBRASKA, EX REL. DOUGLAS*, 458 U.S. 941 (1982)

COCA acknowledged that Petitioner Peggs Water Company appropriates groundwater from a well located on its property. App., *infra*, at 5a. Although not directly addressing the issue, COCA appears to have concluded that GRDA owns and therefore can sell groundwater regardless of who owns the land. COCA stated "[A]ll of the water taken by the Water Districts comes from within the conservation and reclamation district (the Grand River water district) established by the State of Oklahoma to preserve, protect and distribute the waters of the Grand River." App., *infra*, at 5a. COCA's apparent conclusion that groundwater is owned by the state/GRDA is contrary to the teachings of *Sporhase*.

CONCLUSION

"Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable

of private ownership is inconceivable." *U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913). Though the water here flows within a nonnavigable stream, over land owned at least in part by the United States, ownership by GRDA (or Oklahoma) of such water, not having been reduced to possession by them through physical capture and control, remains inconceivable. COCA's finding of ownership in GRDA and its interpretation of 82 O.S. § 862 is repugnant to the Commerce Clause, Article I, § 8, cl. 3 of the United States Constitution. The COCA decision and 82 O.S. § 862 now serve as a springboard for Oklahoma to exercise a state ownership right over water resources which this Court has held does not exist.

For the reasons expressed above, Petitioners respectfully move this Court to issue its Writ of Certiorari to review the Opinion and Judgment of the Court of Civil Appeals of the State of Oklahoma, entered herein on May 7, 2010 and the Judgment of the Oklahoma Supreme Court entered September 20, 2010 denying Petitioners' state Petition for Certiorari.

Respectfully submitted,

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APPENDIX 1

THIS OPINION HAS BEEN RELEASED
FOR PUBLICATION BY ORDER OF
THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION II

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, WAGONER COUNTY RURAL WATER DISTRICT NO. 7, WAGONER COUNTY RURAL WATER DISTRICT NO. 9, CHEROKEE COUNTY RURAL WATER DISTRICT NO. 11, PEGGS WATER COMPANY and TRI-B NURSERY, INC.,	)	Case No. 107,078
Plaintiffs/Appellants,	)	(Filed May 7, 2010)
vs.	)	
GRAND RIVER DAM AUTHORITY,	)	
Defendant/Appellee.	)	

APPEAL FROM THE DISTRICT COURT
OF CRAIG COUNTY, OKLAHOMA

HONORABLE TERRY H. MCBRIDE, TRIAL JUDGE

AFFIRMED

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C. Matthew Bickell
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OPINION BY JOHN F. FISCHER, PRESIDING JUDGE:

¶1 Wagoner County Rural Water District No. 2, Wagoner County Rural Water District No. 7, Wagoner County Rural Water District No. 9, Cherokee County Rural Water District No. 11, Peggs Water Company and Tri-B Nursery, Inc., (Water Districts), appeal from an order of the district court dismissing their First Amended Petition. The appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S. Supp. 2008, ch. 15, app. 1, and the matter stands submitted without appellate briefing. Based on our review of the record and applicable law, we affirm.

BACKGROUND

¶2 Each of the Water District plaintiffs is required to pay the Grand River Dam Authority for water. The Water Districts filed suit alleging that the GRDA does not have any rights to the water for which they are

being charged. The GRDA moved to dismiss pursuant to 12 O.S. Supp. 2004 § 2012(B)(6), arguing that the Water Districts' petition failed to state a claim on which relief could be granted.[1] The district court's order granting the GRDA's motion to dismiss is the subject of the Water Districts' appeal.

STANDARD OF REVIEW

¶3 Appellate review of GRDA's motion to dismiss is governed by the standard set forth in *National Diversified Business Services, Inc. v. Corporate Financial Opportunities, Inc.*, 1997 OK 36, ¶ 9, 946 P.2d 662, 665-66:

> A motion to dismiss for failure to state a claim upon which relief can be granted may not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the stated claim for relief.

Id. at ¶ 9, 946 P.2d at 665 (footnotes omitted). Where, as here, evidentiary materials are attached to a section 2012(B)(6) motion or response, a court must convert the motion into one for summary judgment. *Id.*, 946 P.2d at 365-66.

> A motion for summary disposition submits the controversy to the court for application of

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[1] The GRDA also asserted 12 O.S. Supp. 2004 § 2012(b)(7), failure to join an indispensable party, as a basis for its motion. That issue is not pertinent to our disposition of this appeal.

> the pertinent law to uncontroverted facts. The tendered evidentiary materials will warrant summary relief if all material facts are undisputed and supportive of but a single inference that favors the movant.

Id., 946 P.2d at 666. A district court's order granting a motion for summary judgment resolves only a question of law. *Id.* at n.18, 946 P.2d at 666 n.18. Accordingly, we will review *de novo* the district court's order, dismissing this case for failure to state a claim on which could be granted. *Id.* at ¶ 9, 946 P.2d at 666. *See also Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053.

ANALYSIS

¶4 The dispositive issue in this appeal requires a determination of the ownership of the water sold by the GRDA to the Water Districts. If the GRDA owns the right to sell the water at issue, then the Water Districts cannot state any cognizable legal theory to support their claim, and the district court properly dismissed their petition.

¶5 The material facts in this case are not in dispute. The four water districts were organized pursuant to the Rural Water, Sewer, Gas and Solid Waste Management Districts Act, 82 O.S. 2001 §§ 1324.1-1324.35. Peggs Water Company and Tri-B Nursery, Inc., are Oklahoma corporations. The four rural water districts and Tri-B Nursery appropriate water from

Fort Gibson Reservoir or its tributaries. Peggs appropriates sub-surface water from a well located on its property. All of the water taken by the Water Districts comes from within the conservation and reclamation district (the Grand River water district) established by the State of Oklahoma to preserve, protect and distribute the waters of the Grand River. The Grand River is a non-navigable water. The Arkansas river, into which the Grand River flows, is a navigable stream.

The GRDA was created in 1935.

> There is hereby created within the State of Oklahoma a conservation and reclamation district to be known as "Grand River Dam Authority", hereinafter called the district, and consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Ottawa, Osage, Pawnee, Payne, Lincoln, Logan, Tulsa, Wagoner, Sequoyah, Haskell, Latimer, Pittsburg, McIntosh, Creek, Okmulgee, Nowata, Washington and Rogers. Such district shall be, and is hereby declared to be, a governmental agency of the State of Oklahoma, body politic and corporate, with powers of government and with the authority to exercise the rights, privileges and functions hereinafter specified, including the control, storing, preservation and distribution of the waters of the Grand River and its tributaries, for irrigation, power and other useful purposes and reclamation and irrigation of arid,

> semiarid and other lands needing irrigation, and the conservation and development of the forests, minerals, land, water and other resources and the conservation and development of hydroelectric power and other electrical energy, from whatever source derived, of the State of Oklahoma.

82 O.S.2001 § 861. The GRDA is authorized to "control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district." 82 O.S.2001 § 862(a). Nonetheless, the Water Districts argue that the GRDA does not "control, store and preserve" the water they are being sold. That argument is alternatively based on an interpretation of a United States Supreme Court decision and interpretation of Oklahoma statutes.

I. The Federal Law Argument

¶6 The right to water consists of two basic but not mutually exclusive interests. One is public and the other private. As to the public interest, the general rule is that the United States owns the superior right to navigable water. *See e.g., U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62, 33 S. Ct. 667, 671 (1913), in which the Supreme Court held that title to real property:

> is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of

> no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the states and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress.

Generally, states own the superior right to non-navigable water.

> [F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 356, 28 S. Ct. 529, 531 (1908).

¶7 The private interest consists of two rights, riparian and appropriative. *Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, 1990 OK 44, ¶¶ 14 and 23, 855 P.2d 568, 575-77.[2] And, although these private

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[2] *Cf.*, Oklahoma's Waters and Water Rights Act: "It is the intent of the Oklahoma Legislature that the purpose of Section 105.1 through Section 105.32 of this title is to provide for stability and certainty in water rights by replacing the incompatible dual systems of riparian and appropriative water rights which governed the use of water from definite streams in Oklahoma prior to June 10, 1963, with an appropriation system

(Continued on following page)

interests are balanced by "relative reasonableness," *id.* at ¶ 27, 855 P.2d at 578, Oklahoma's "power to control unappropriated public waters is plenary. Definite nonnavigable streams are public waters. The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes." *Oklahoma Water Res. Bd. v. Cent. Okla. Master Conservancy Dist.*, 1968 OK 73, ¶ 14, 464 P.2d 748, 753. Further, "[t]he Legislature may exercise its police power to protect the state's water irrespective of the rights of private owners of the land most immediately concerned." *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶ 23, 148 P.3d 842, 849-50. Pursuant to this plenary power, the Oklahoma Legislature clearly granted to the GRDA the right to "control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries." 82 O.S.2001 § 862(a). The Water Districts, however, do not claim a superior riparian or appropriative right. They argue that the United States Supreme Court determined in 1960 that the GRDA does not own any rights to the Fort Gibson portion of the Grand River

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of regulation requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that riparian landowners may use water for domestic uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriative, existing prior to June 10, 1963, and to extinguish future claims to use water, except for domestic use, based only on ownership of riparian lands." 82 O.S.2001 § 105.1A.

water district, the source of the water they appropriate from the Grand River water district.

¶8 In 1956, the GRDA sued the United States over the right to generate electric power from the Fort Gibson reservoir. The GRDA had recovered compensation when Fort Gibson dam was built for a 70-acre tract of land condemned, for the flow of the Grand River over that land, and for the costs of relocating its electric power transmission lines. The GRDA also claimed it had been deprived of its exclusive power to generate hydroelectric power within the Grand River water district. The Court of Claims found that the Government was liable for taking the GRDA's water power rights, and the Government appealed. The decision on which the Water Districts rely, *United States v. Grand River Dam Auth.*, 363 U.S. 229, 80 S. Ct. 1134 (1960), resolved the litigation. The GRDA argued that, although the federal government had the right to navigable waters, the Grand River was a non-navigable stream over which the State of Oklahoma had control. It was not disputed that Oklahoma had conferred its right to the water within the Grand River water, district, as well as the franchise right to generate electric power from that water, to the GRDA. The GRDA operates electric generating facilities at the Pensacola and Markham Ferry dams, and claimed the right to do so at Fort Gibson, the most downstream of the three dams on the Grand River. Therefore, the GRDA claimed that the federal government's operation of the electric generating facility

at Fort Gibson constituted a "taking" for which the GRDA was entitled to be compensated.

¶9 The three dam projects on the Grand River had been incorporated into the Flood Control Act by Congress in 1941. Fort Gibson was completed as "an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of power on the Arkansas and its tributaries." *Id.* at 230, 80 S. Ct. at 1135. Although recognizing state ownership of non-navigable waters, the Supreme Court found "no constitutional reason why Congress cannot, under the commerce power treat the watersheds as a key to flood control on navigable streams and their tributaries." *Id.* at 232, 80 S. Ct. at 1136. Pursuant to the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, the Court found this interest "superior" to any state interest. Relying on *Omnia Commercial Co. v. United States,* 261 U.S. 502, 43 S. Ct. 437 (1923), for the proposition that many laws and rulings by the federal government reduce the value of property held by individuals, the Court held that the "Court of Claims erred in failing to distinguish between an appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power." *Grand River Dam*, 363 U.S. at 236, 80 S. Ct. at 1138.

¶10 This case does not hold, as the Water Districts argue, that the GRDA failed to prove that it had any right to the water in the Fort Gibson reservoir. In fact, the Supreme Court specifically refused to reach the issue argued by the United States: the federal

government's right to navigable water preempts state created property rights to non-navigable water. The case merely holds that the right of the GRDA to produce electricity from the Fort Gibson reservoir was inferior to the right of the federal government to do so.

¶11 As previously discussed, many and often competing interests may have legitimate claims to the same water. The fact that one interest may be superior to another does not extinguish the inferior interest; it merely establishes the priority of the superior use. Further, "the existence of unexercised federal regulatory power does not foreclose state regulation of its water resources, [or] of the uses of water within the state. . . ." *Sporhase v. Nebraska,* 458 U.S. 941, 954, 102 S. Ct. 3456, 3463 (1982) (invalidating a state statute restricting the use of groundwater outside the state). Mutual, complimentary use of water is contemplated by Oklahoma law. *Franco-American,* 1990 OK 44 at ¶ 14, 855 P.2d at 575-76. It is also contemplated by federal law. In *Pennsylvania v. Wheeling & Belmont Bridge* Co., 59 U.S (18 How.) 421 (1855), the Supreme Court held that a bridge over the Ohio river, constructed pursuant to a Virginia statute, created an obstruction to navigation that should be removed. Before the decree was executed, Congress declared the bridge a lawful structure and the Court refused to order removal of the bridge.

> Although it still may be an obstruction in fact, [it] is not so in contemplation of law. We have already said, and the principle is undoubted,

> that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and Federal, which, if not sufficient, certainly none can be found in our system of government.

Id. at 430. Consequently, the ruling in *United States v. Grand River Dam Authority* cannot be extended to support the Water Districts' position that the government's right to build a flood control dam and produce electricity at Fort Gibson precludes any other complimentary use of the water by the GRDA, or preempts all other rights previously granted the GRDA by the State of Oklahoma to the water in the Fort Gibson reservoir, its streams, tributaries and associated groundwater.

¶12 Finally, the Water Districts' reliance on 82 O.S.2001 § 105.21 does not advance their argument. That statute provides, in part:

> The owner of any works for the storage, diversion or carriage of water, which contain water in excess of his needs for irrigation or other beneficial use for which it has been appropriated, shall be required to deliver such surplus, at reasonable rates for storage or

> carriage, or both, as the case may be, to the parties entitled to the use of the water for beneficial purposes. . . .

¶13 The Water Districts argue that section 105.21 conveys to the United States ownership of, or at least the right to sell, water in the Fort Gibson reservoir, because the federal government owns the Fort Gibson dam. No other authority is cited for this proposition and no reported case has interpreted this statute. Nonetheless, the Water Districts' construction is irreconcilable with other provisions in the Waters and Water Rights Act. Section 105.9 requires that any "federal governmental agency . . . intending to acquire the right to the beneficial use of any water shall . . . before taking the same from any constructed works, make an application to the Board. . . ." Section 105.29 requires officers of the United States "authorized by law to construct works for the utilization of waters within the state" to notify the Water Resources Board of their intent to utilize specified water within the State. The Board may approve, reduce or reject the United States' intended utilization. The fact that the United States has the right to build a dam for flood control and hydroelectric generating purposes does not establish the federal government's ownership of the water affected. As previously discussed, the fundamental right to the water of the Grand River, including that water within the Fort Gibson reservoir, belongs to the State of Oklahoma and has been transferred to the GRDA. The Water

Districts therefore fail to establish that the United States has the right to sell the water at issue.

II. The State Law Argument

¶14 The Water Districts' State law argument relies on two statutes. The first, 82 O.S.2001 § 887, provides: "[T]he waters of Grand River in Oklahoma and the Pensacola and Markham Ferry Reservoirs, located thereon, be and are hereby determined and declared to be non-navigable and waters of the State of Oklahoma." Because this statute was enacted in 1963, thirteen years after the construction of the Fort Gibson dam, the Water Districts conclude that the Legislature, by its omission of any reference to the Fort Gibson reservoir, intended to exclude waters below the Markham Ferry dam from the authority of the GRDA. The second statute, 82 O.S.2001 § 890, provides: "The Grand River Dam Authority shall have no control over that portion of the Grand River downstream from Fort Gibson Dam to the point of confluence of the waters of the Grand River with those of the Arkansas River." With the specific exclusion of water between the Fort Gibson dam and the Arkansas river, the Water Districts conclude that the Legislature also intended to exclude the water from which the excluded waters were derived, in their view, the Fort Gibson reservoir.

¶15 Other than these statutory citations, the Water Districts cite no authority to support their construction of these statutes. Nonetheless, principles of statutory construction are generally accepted.

> The determination of legislative intent controls statutory interpretation. The intent is ascertained from the whole act based on its general purpose and objective. In construing statutes, relevant provisions must be considered together whenever possible to give full force and effect to each. To ascertain intent, we look to the language of the pertinent statute. We presume that the Legislature intends what it expresses. Except when a contrary intention plainly appears, terms are given their plain and ordinary meaning.

Oklahoma Ass'n For Equitable Taxation v. City of Oklahoma City, 1995 OK 62, ¶ 5, 901 P.2d 800, 803 (footnotes omitted). With respect to the Water Districts' section 887 argument, it is true, as a general rule, that the failure to include an item evidences an intent to omit the item. "[T]he general rule is that nothing may be read into a statute which was not within the manifest intention of the legislature as gathered from the language of the act" *Stemmons, Inc. v. Universal C.I.T. Credit Corp.,* 1956 OK 221 ¶ 19, 301 P.2d 212, 216. *See also McSorley v. Hertz Corp.,* 1994 OK 120, ¶ 19, 885 P.2d 1343, 1346 (legislative omission is evidence of intent not to cover the omitted subject). Nonetheless, "[w]hen construing statutes, all relevant provisions must be considered together, where possible, so that force and meaning is

given to each." *Dana P. v. State,* 1982 OK 140, ¶ 23, 656 P.2d 253, 258. Further, "in the construction of statutes to determine legislative intent, the entire act may be considered, together with all other enactments on the same subject, and when the intention of the Legislature can be gathered from the entire statute, words may be modified, altered, or supplied to give the statute the force and effect intended." *Charlson v. State ex rel. Dep't of Pub. Safety,* 2005 OK 83, ¶ 10, 125 P.3d 672, 675.

¶16 First, the Water Districts' construction of section 890 is inconsistent with its interpretation of section 887. The water flowing out of Fort Gibson reservoir and excluded from GRDA authority pursuant to section 890 flowed into that reservoir from waters included within the Grand River water district, and waters that the Water Districts concede are specifically included within the GRDA's authority pursuant to section 887. Although the authority of the GRDA over water below the Fort Gibson dam may be limited, the non-navigable nature of that water does not change until it reaches the Arkansas River.

¶17 Second, the Water Districts' construction of section 887 is unacceptably narrow. The designation of particular waters, the Pensacola and Markham Ferry reservoirs, as non-navigable does not require the conclusion that all reservoirs not designated are navigable. This is particularly true when the statute begins with the designation of the Grand River as non-navigable. The State's ownership depends on the

non-navigable nature of the water, not the State's articulation of that fact.

¶18 Third, the Water Districts' construction of section 887 fails to reconcile the authority granted to the GRDA pursuant to sections 861 and 862:

> There is hereby created within the State of Oklahoma a conservation and reclamation district to be known as "Grand River Dam Authority" . . . consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Ottawa, Osage, Pawnee, Payne, Lincoln, Logan, Tulsa, Wagoner, Sequoyah, Haskell, Latimer, Pittsburg, McIntosh, Creek, Okmulgee, Nowata, Washington and Rogers.

Within that district, the GRDA has the right to "the control, storing, preservation and distribution of the waters of the Grand River and its tributaries." 82 O.S.2001 § 861. It is undisputed that the Fort Gibson reservoir is within the Grand River conservation and reclamation district. The statute creating the GRDA and defining its functions is "an express appropriation by the state of the waters in Grand River to be applied to the uses therein stated, and to place in its said agency exclusive authority to develop the stream in the manner therein provided." *Grand-Hydro v. Grand River Dam Auth.*, 1943 OK 158, ¶ 18, 139 P.2d 798, 801. There is only one exception to the authority granted the GRDA to control the waters of the Grand River; "any municipal corporation within the area

included within the jurisdiction of the said Grand River Dam Authority shall be entitled to take water from the Grand River and any of its tributaries in any quantities that may be needed by such municipal corporation." 82 O.S. Supp. 2008 § 862(a). None of the Water Districts is a municipal corporation, and we will not "read into" the statute an exception the Legislature did not create.

¶19 Finally, the GRDA has been charging, and the Water Districts have been paying the GRDA, for the water at issue for a substantial period of time even before the Water Districts began their legal challenges to the GRDA's right to do so.

> It is a well settled rule that the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. The courts are especially reluctant to overturn a long standing executive or departmental construction where great interests have grown up under it and will be disturbed or destroyed by the announcement of a new rule, or where parties who have contracted with the government upon the faith of such construction will be prejudiced.

Oral Roberts Univ. v. Oklahoma Tax Comm'n, 1985 OK 97, ¶ 10, 714 P.2d 1013, 1015 (quoting *McCain v. State Election Bd.,* 1930 OK 323, ¶ 16, 289 P. 759,

762-63). We find no reason to overturn the GRDA's construction of these statutes.

CONCLUSION

¶20 The GRDA was created by the State of Oklahoma and vested with the right to control, store, preserve and distribute the waters of the Grand River and its tributaries. Included among those rights is the right to sell water to the Water Districts. No superior right held by the United States affects or supersedes the right of the GRDA to do so. Consequently, the Water Districts can state no claim entitling them to relief based on the facts alleged in their First Amended Petition. The Order of the district court dismissing that petition is affirmed.

¶21 **AFFIRMED.**

WISEMAN, C.J., and BARNES, J., concur.

May 7, 2010

APPENDIX 2

IN THE DISTRICT COURT OF CRAIG COUNTY
STATE OF OKLAHOMA

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, WAGONER COUNTY RURAL WATER DISTRICT NO.7, WAGONER COUNTY RURAL WATER DISTRICT NO.9, CHEROKEE COUNTY RURAL WATER DISTRICT NO. 11, PEGGS WATER COMPANY, and TRI-B NURSERY, INC.	)	Case No. CJ-08-43
Plaintiff	)	
VS.	)	
GRAND RIVER DAM AUTHORITY,	)	
Defendant.	)	

ORDER DISMISSING CASE

Now on this 13th day of April, 2009, the Court having carefully reviewed the files and records in the case, and having reviewed the Motion Dismiss Plaintiff's First Amended Petition filed by the Defendant in the above entitled and numbered case and Plaintiff's Response thereto, as well as all the pleadings in the case, and having carefully reviewed the evidentiary materials, briefs and arguments submitted by all parties in support of their respective claims, FINDS:

1. That Title 82, Okla. Stat., Section 861, grants the Defendant the right to control, store, and preserve, as well as distribute the waters of the Grand River in the County(s) of the Plaintiff.

2. That there is no exception for the situation presented herein by the Plaintiff that the Defendant must be the entity that impounds and maintains the reservoir known as Fort Gibson Lake in order to carry on the activities outlined in Section 861.

3. The Governmental entity that impounded and maintains Fort Gibson Lake may or may not have the right to supersede the Defendant in certain activities but has not taken any action that would interfere with the activities complained of in Plaintiff's Petitions.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Motion Dismiss by the Plaintiff is granted for failure to state a claim upon which relief could be granted, and the above entitled and numbered cause is hereby DISMISSED.

/s/ Terry H. McBride
Hon. Terry H. McBride
District Judge

CERTIFICATE OF MAILING

I, Honorable Terry H. McBride, hereby certify that a true and correct copy of the above and foregoing Order, was mailed on this 13 day of April, 2009, with the proper postage affixed thereon to:

Mr. Steven M. Harris
Mr. C. Matthew Bickell
1350 South Boulder, Suite 700
Tulsa, OK 74119

Mr. James M. Reed
Mr. Michael D. Graves
Mr. T. Richer
Hall, Estill, Hardwick, Gable
Golden & Nelson, P.C.
320 S. Boston Ave., Suite 400
Tulsa, OK 74103-3708

/s/ Terry H. McBride
Terry H. McBride
District Judge

APPENDIX 3

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MONDAY, SEPTEMBER 20, 2010

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

105,749 In Re the Marriage of
A. Graham Wilson v. A. Wilson
Both petitions for certiorari are denied.
ALL JUSTICES CONCUR

106,381 Janet Karner, individually and as surviving spouse of Kenneth Karner, deceased, et al v. Steven Redd, et al
Petition for certiorari is denied.
ALL JUSTICES CONCUR

107,035 L.G. Sam Davis v. Eddie P. Mayberry, et al and Donald R. And Sharon Y. Mayberry, husband and wife and Soloman Lee, Jr., et al
Petition for certiorari is denied.
ALL JUSTICES CONCUR

107,078 Wagoner County Rural Water District No. 2, et al v. Grand River Dam Authority
Petition for certiorari is denied.
ALL JUSTICES CONCUR

107,141 High Sierra Energy, L.P., a Delaware Limited Partnership v. David R. Hull, an individual, et al
Petition for certiorari is denied.
CONCUR: Edmondson, C.J., Hargrave, Kauger, Winchester, Colbert, Reif, JJ.
DISSENT: Taylor, V.C.J., Opala, Watt, JJ.

107,671 Jason D. Williams v. Board of Oklahoma Polygraph Examiners
Petition for certiorari is denied.
CONCUR: Edmondson, C.J., Taylor, V.C.J., Hargrave, Opala, Kauger, Watt, Winchester, Colbert, JJ.
DISSENT: Reif, J.

107,822 Thomas R. Nelson v. Robert Ricketson, M.D., et al
Petition for certiorari is denied.
ALL JUSTICES CONCUR

/s/ J. E. Edmondson
CHIEF JUSTICE

APPENDIX 4

82 Okl.St.Ann. § 862

Oklahoma Statutes

Title 82. Waters and Water Rights

Chapter 8. Grand River Dam Authority

§ 862. Powers, rights and privileges of district

The district shall have and is hereby authorized to exercise the following powers, rights and privileges:

(a) To control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district; provided, however, that any municipal corporation within the area included within the jurisdiction of the said Grand River Dam Authority shall be entitled to take water from the Grand River and any of its tributaries in any quantities that may be needed by such municipal corporation;

(b) To develop and generate water power, electric power and electric energy, from whatever source, within the boundaries of the district; to acquire coal or other minerals to be used for the purposes of providing energy sources for electrical generating plants; to acquire or lease any and all railroad connections, equipment, rolling stock, trackage and otherwise, necessary to the transporting of coal and other minerals to generating plant sites within the district; and to buy, sell, resell, interchange and

distribute electric power and energy in order to carry forward the business and functions of the district now or hereafter authorized by law and may enter into contracts for such purposes, such contracts to run for a period of not to exceed fifty (50) years except those contracts provided for in paragraphs (f) and (g) of this section. All contracts may contain such reasonable provisions, limitations, qualifications, protective clauses and rights and obligations of purchase and sale, and such provisions for the dedication of the use of facilities and the construction of additional facilities to serve the load requirements of all the parties as may be deemed advisable by the district to safeguard the business and properties of all the parties to such contracts, all within the limits of sound business judgment and practice, good conscience, and not contrary to the public policy of the state;

(c) To prevent or aid in the prevention of damage to person or property from the waters of the Grand River and its tributaries;

(d) To forest and reforest and to aid in the foresting and reforesting of the watershed area of the Grand River and its tributaries and to prevent and to aid in the prevention of soil erosion and floods within said watershed area;

(e) To acquire by purchase, lease, gift, or in any other manner, and to maintain, use and operate or to contract for the maintenance, use and operation of any and all property of any kind, real, personal, or mixed, or any interest therein, including trucks of

any size or weight and passenger vehicles and to own, construct, operate and maintain any project or works in conjunction or jointly with, as tenants in common, any public or private corporation duly authorized and qualified to do business within this state including, but not limited to, rural electric cooperatives of the State of Oklahoma or the United States of America, or any department, subdivision or agency of the State of Oklahoma or the United States of America, or with any "public agency" as defined under the Interlocal Cooperation Act, Sections 1001 through 1008 of Title 74 of the Oklahoma Statutes, within or without the boundaries of the district, necessary, incidental or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this act;[1]

(f) In addition to any other powers conferred, the district shall have power and authority to participate and enter into agreements with any public or private corporation duly authorized and qualified to do business within the State of Oklahoma including, but not limited to, rural electric cooperatives, the state or the United States of America or any department, subdivision or agency of the state or the United States of America, or with any "public agency" as defined under the Interlocal Cooperation Act, Sections 1001 through 1008 of Title 74 of the Oklahoma Statutes, for the purpose of planning, acquiring, financing, owning, operating and maintaining an

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[1] Title 82, § 861 et seq.

undivided ownership of any steam, oil, gas, coal-fired, thermal, geothermal, solar, waste or refuse reclamation powered electric generating plant or plants or any facilities of every kind necessary, incidental or convenient for the production, generation and transmission of electric power and energy including, but not limited to, any and all related transmission facilities, which shall be used as common facilities. The agreements shall provide that the district and any participants therein shall have the incidents of tenant in common to any plant or facility. It shall also be provided in the agreements that the district and any participant in the project shall own a percentage of any common facility equal to the percentage of the money furnished or the value of property supplied by it for the acquisition and construction thereof and shall own and control a like percentage of the electrical output thereof.

Each participant shall defray its own interest payments and other payments required to be made or deposited in connection with any financing undertaken by it to pay its percentage of the money furnished or value of property supplied by it for the planning, acquisition and construction of any common facility, or any additions or betterments thereto. The agreement shall further provide a uniform method of determining and allocating operation and maintenance expenses of the common facility.

In carrying out the powers granted in this section, the district and each participant shall be severally liable only for its own acts and not jointly or severally liable

for the acts, omissions or obligations of others. No money or property supplied by the district or any participant for the planning, financing, acquiring, constructing, operating or maintaining of any common plant or facility shall be credited or otherwise applied to the account of any other participant therein, nor shall the undivided share of the district or any participant therein be charged, directly or indirectly, with any debt or obligation of any other participant or be subject to any lien as a result thereof. No action in connection with a common facility shall be binding upon the district except as expressly authorized and provided for in the participation agreement;

(g) In addition to the powers conferred in paragraph (f) of this section, the district shall have power and authority to participate and enter into agreements with any public or private corporation duly authorized and qualified to do business within this state including, but not limited to, rural electric cooperatives, the State of Oklahoma or the United States of America or any department, subdivision or agency of the State of Oklahoma or the United States of America, or with any "public agency" as defined under the Interlocal Cooperation Act, Sections 1001 through 1008 of Title 74 of the Oklahoma Statutes, for the purpose of planning, acquiring, financing, owning, operating and maintaining undivided ownership interests in any steam, oil, gas, coal-fired, thermal, geothermal, solar, waste or refuse reclamation powered electric generating plant or plants or any other facilities of every kind necessary, incidental or

convenient for the production, generation and transmission of electric power and energy including, but not limited to, any and all related transmission or other facilities which are to be used as common facilities and to cooperate with other state agencies and public trusts to promote economic development in the state and to assist in attracting industry to the state. Such undivided ownership interests may be created by an agreement entered into with respect to property to be acquired by the district. Any such agreement may be a sale agreement, with the purchase price payable at one time or in installments at such time and over such period as shall be agreed to by the parties thereto, a lease agreement, with a nominal purchase option, or any other type of agreement. In addition to the purchase price, the district shall be fully indemnified as to operation, maintenance, administrative and other expenses incurred with respect to such undivided interest. Any payment received in respect to any such agreement shall be deemed revenues of the Authority. The district is hereby authorized to enter into any such agreement in order to sell, lease or otherwise convey undivided ownership interests in any such property. Any such agreement shall specify the undivided interest to be owned or acquired by each of the participants, provide for a waiver of partition, prescribe the time of vesting of such interest and the amount of electrical output to be owned and controlled by any participant.

Each participant shall defray its own interest and other payments required to be made or deposited in

connection with any financing undertaken by it to pay its percentage of the money furnished or value of property supplied by it for the planning, acquisition and construction of any common facility, or any additions or betterments thereto. The agreement shall provide a uniform method of determining and allocating operation and maintenance expenses of the common facility.

In carrying out the powers granted in this section, the district and each participant shall be severally liable only for its own acts and not jointly or severally liable for the acts, omissions or obligations of others. No money or property supplied by the district or any participant for the planning, financing, acquiring, constructing, operating or maintaining of any common plant or facility shall be credited or otherwise applied to the account of any other participant therein, nor shall the undivided share of the district or any participant therein be charged, directly or indirectly, with any debt or obligation of any other participant or be subject to any lien as a result thereof. No action in connection with a common facility shall be binding upon the district except as expressly authorized and provided for in the participation agreement;

(h) To acquire by condemnation any and all property of any kind, real, personal, or mixed, or any interest therein, within or without the boundaries of the district, necessary, incidental or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this act, in the manner

provided by general law with respect to condemnation; provided that nothing in this act shall ever be construed to authorize the district to acquire by condemnation any privately, municipally or publicly owned electric public utility system or any part thereof outside of the high-water mark of a reservoir area or outside a properly located damsite, except the districts may require the relocation of transmission lines and substations so owned where such relocation is necessary for the construction and maintenance of dams, reservoirs, levees, spillways and floodways, and in such event just compensation shall be paid. Provided that the Grand River Dam Authority shall have the right to cross transmission lines of other electric utility companies under proper engineering standards of construction as approved by the Corporation Commission;

(i) Subject to the provisions of this act, from time to time sell, which shall include, but not be limited to, an installment sale agreement, lease with nominal purchase options, or otherwise dispose of any property of any kind, real, personal or mixed, or any interest therein, which shall not be necessary to the carrying on of the business of the district;

(j) To overflow and inundate any public lands and public property and to require the relocation of roads and highways in the manner and to the extent necessary to carry out the purposes of this act; provided, that said district shall be liable in damages to the State of Oklahoma or any subdivision thereof for any

injury occasioned or expense incurred by reason thereof;

(k) To construct, extend, improve, maintain and reconstruct, to cause to be constructed, extended, improved, maintained and reconstructed, and to use and operate any and all facilities of any kind necessary, incidental or convenient to the exercise of such powers, rights, privileges and functions;

(l) To sue and be sued in its corporate name in contracts, reverse condemnation, tort, equity, mandamus and similar actions and in its own name plead and be impleaded, provided, however, that any and all actions of law or in an equity against the district shall be brought in the county in which the principal office of the district shall be located or in the county where the cause of action arose;

(m) To adopt, use and alter a corporate seal;

(n) To make bylaws for the management and regulation of its affairs;

(o) To appoint officers, agents and employees, to prescribe their duties and to fix their compensation; and enter into contracts with labor unions, provided, that contracts with labor unions shall not abrogate the rights of the district to cooperate and carry out Veterans on the Job Training;

(p) To make contracts and to execute instruments necessary, incidental or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this act;

(q) To borrow money for its corporate purposes and, without limitation of the generality of the foregoing, to borrow money and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with any such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require; and to make and issue its negotiable bonds for money borrowed, in the manner provided in this act. Nothing in this act shall authorize the issuance of any bonds, notes or other evidences of indebtedness of the district, except as specifically provided in this act;

(r) To prescribe and enforce rules for the use for recreational and commercial purposes of the lakes created by the district by impounding the waters of said lakes, and the shorelands of the district bordering thereon, including the use of firearms, the inspection of all boats of every character proposing to operate or operating on said lakes, the issuance of permits for the operation of boats, surfboards, aquaplanes, sea-skis or similar devices on said lakes for hire; the charging and collection of fees for the inspection or operation of such boats, surfboards, aquaplanes, sea-skis or other similar devices on said lakes for hire; preventing the launching or operation of any commercial or for-hire boat, surfboard, aquaplane, sea-ski or similar device for hire, on the waters of said lakes, without a certificate of inspection and a permit for such use; prescribing the type, style, location and equipment of all wharves, docks and

anchorages along the shores and upon the water of said lakes; the issuance of permits for wharfage, dock or anchorage privileges and charging fees for such commercial or private permits; and the establishment and maintenance of public wharves, docks or anchorages and the charging and collection of fees for the use thereof by the public; to appoint or employ such persons as the district may deem proper and suitable for the purpose of enforcing such rules and regulations as may be issued hereunder, or as may be issued pursuant to the provisions of Sections 4200 et seq. of Title 63 of the Oklahoma Statutes, and for the enforcing of the provisions of this act, and all violations of criminal laws occurring within the boundaries of the counties where real property owned or leased by the Grand River Dam Authority is located, which employees shall have the power of peace officers during the performance of those duties, except in the serving or execution of civil process;

(s) To do any and all other acts or things necessary, incidental or convenient to the exercise of the powers, rights, privileges or functions conferred upon it by this act or any other act or law. Provided said district shall be liable for damage caused by said district, its agents, servants and employees in creating, constructing, maintaining or operating said district to any corporation, partnership, person or individual whose property, either real or personal, within or without said district, has been damaged and said damages may be determined by appropriate action as provided by law. Nothing in this act shall

be construed as rendering the district liable for damage where it is not liable on general principles of law or statute or Constitutional provision.

Provided, however, that in the course of exercising its powers as herein enumerated, the said district shall at all times consider the rights and needs of the people living within and upon the land lying within the watershed of the rivers or streams developed by the district; provided, however, that nothing herein shall prevent the district from selling for irrigation purposes within the boundaries of the district any water impounded by it under authority of law, provided that nothing herein contained shall authorize the state to engage in agriculture except for educational and scientific purposes and for the support of its penal, charitable, and educational institutions; and

(t) To support and assist the efforts of state, regional and local development organizations, political subdivisions, industrial committees, chambers of commerce, tourism organizations, agricultural organizations, environmental organizations and other similar public and private agencies to obtain new and foster expansion of existing service, industrial and manufacturing facilities, businesses and enterprises to enhance the quality of life for the citizens of the district and the state. Provided, support and assistance shall be limited to an amount not to exceed a total of Twenty-five Thousand Dollars ($25,000.00) per year for one or more projects or efforts that are for the benefit of or impact the quality of life for each

city or community located within the boundaries of the district.

(u) Notwithstanding any other provision of law, the General Manager, department heads and other essential employees of the district, as designated by the General Manager, may be permitted to use a district owned vehicle to provide transportation between the employee's residence and the assigned place of employment and between the residence and any location other than the assigned place of employment to which the employee travels in the performance of the employee's official duty.

APPENDIX 5

IN THE DISTRICT COURT IN AND FOR CRAIG COUNTY STATE OF OKLAHOMA

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, WAGONER COUNTY RURAL WATER DISTRICT NO. 7, WAGONER COUNTY RURAL WATER DISTRICT NO. 9, CHEROKEE COUNTY RURAL WATER DISTRICT NO. 11, PEGGS WATER COMPANY and TRI-B NURSERY, INC.,	)	Case No. CJ-08-43
Plaintiffs,	)	
vs.	)	**Jury Trial Demanded**
GRAND RIVER DAM AUTHORITY	)	
Defendant.	)	

FIRST AMENDED PETITION

(Filed Jun. 12, 2008)

COME NOW Plaintiffs, Wagoner County Rural Water District No. 2, Wagoner County Rural Water District No. 7, Wagoner County Rural Water District No. 9, Cherokee County Rural Water District No. 11, Peggs Water Company, and Tri-B Nursery, Inc., and for their Petition against the Defendant, allege and state as follows:

PARTIES

1. Plaintiff, Wagoner County Rural Water District No. 2 ("Wagoner 2"), is an Oklahoma rural water district formed pursuant to 82 O.S. §1324.1 *et seq.* and created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District.

2. Plaintiff, Wagoner County Rural Water District No. 7 ("Wagoner 7"), is an Oklahoma rural water district formed pursuant to 82 O.S. § 1324.1 *et seq.* and created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District.

3. Plaintiff, Wagoner County Rural Water District No. 9 ("Wagoner 9"), is an Oklahoma rural water district formed pursuant to 82 O.S. §1324.1 *et seq.* and created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District.

4. Plaintiff, Cherokee County Rural Water District No. 11 ("Cherokee 11"), is an Oklahoma rural water district formed pursuant to 82 O.S. §1324.1 *et seq.* and created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District.

5. Plaintiff, Peggs Water Company ("Peggs") is a Oklahoma not-for-profit corporation with its principal place of business in Peggs, Oklahoma.

6. Plaintiff, Tri-B Nursery, Inc. is an Oklahoma corporation with its principal place of business in Tahlequah, Oklahoma.

7. Defendant, Grand River Dam Authority ("GRDA") is a conservation and reclamation district and agency of the State of Oklahoma created by the statutes of the State of Oklahoma, 82 O.S. § 861, *et seq.* "for the purpose of utilizing the waters of Grand River and its tributaries." *Grand River Dam authority v. Wyandotte Board of Education,* 147 P.2d 1003, 1004 (Okla. 1943).

JURISDICTION AND VENUE

8. This Court has jurisdiction and venue over this action pursuant to 82 O.S § 862(1).

9. GRDA may be sued in its corporate name pursuant to 82 O.S. § 862(1).

10. None of the claims asserted against GRDA herein are subject to the Oklahoma Governmental Tort Claims Act, 51 O.S. § 151 *et seq.*, under the circumstances of this case.

GENERAL FACTUAL ALLEGATIONS

A. Creation of the Fort Gibson Dam and Reservoir

11. The Fort Gibson Dam is in the Arkansas River Basin on the Grand (Neosho) River. It is located at mile 7.7, Lat. 35°52'11", Long. 95°13'47" in Section 18, T16N, R20E in Cherokee County, Oklahoma approximately 5 miles north of the town of Fort Gibson and about 12 miles northeast of Muskogee.

12. The Fort Gibson Dam was designed and constructed by the United States Army Corps of Engineers ("USACE"). Construction was started in 1942 and was suspended during World War II. Construction of the Dam was completed on September 2, 1953 at a cost of $42,535,000.00.

13. The Fort Gibson Dam was constructed for the purpose of flood control and the generation of hydroelectric power. Its construction was authorized by the Flood Control Act of 1941 and incorporated in the Arkansas River multiple-purpose plan by the River and Harbor Act of 1946.

14. Water enters the Fort Gibson Reservoir from the Grand (Neosho) River, Salt Creek, Spring Creek, Big Hollow Creek, Jane Dennis Creek, Clear Creek, Hickory Creek, Fourteenmile Creek, Double Spring Creek, Ranger Creek, Flat Rock Creek, Brush Creek, Chouteau Creek, Pryor Creek and other streams and tributaries.

15. The largest source of water flowing into the Fort Gibson Reservoir is the Grand (Neosho) River. GRDA owns and controls the Pensacola Dam, Pensacola Project upriver from Fort Gibson Reservoir. GRDA releases water from the Pensacola Reservoir (designated pursuant to 82 O.S. § 861 as the Grand Lake O' the Cherokees) which flows into the Markham Ferry Reservoir (designated pursuant to 82 O.S. § 861 as Lake Hudson). GRDA owns and controls the Robert S. Kerr Dam, Markham Ferry Project and releases water from the Markham Ferry Reservoir. This water then flows into the Fort Gibson Reservoir which is owned and operated by USACE. This same water is released from the Fort Gibson Dam and eventually enters the Arkansas River and leaves the State of Oklahoma.

B. Formation and Powers Purportedly Granted to GRDA

16. In 1935, the Oklahoma Legislature adopted 82 O.S. § 861 creating a conservation and reclamation district to be known as "Grand River Dam Authority" consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Ottawa, Osage, Pawnee, Payne, Lincoln, Logan, Tulsa, Wagoner, Sequoyah, Haskell, Latimer, Pittsburg, McIntosh, Creek, Okmulgee, Nowata, Washington and Rogers.

17. GRDA was declared to be a governmental agency of the State of Oklahoma, body politic and corporate, with powers of government and with the authority to exercise the rights, privileges and functions specified by 82 O.S. § 861 *et seq.*, including the control, storing, preservation and distribution of the waters of the Grand River and its tributaries, for irrigation, power and other useful purposes and reclamation and irrigation of arid, semiarid and other lands needing irrigation, and the conservation and development of the forests, minerals, land, water and other resources and the conservation and development of hydroelectric power and other electrical energy, from whatever source derived, of the State of Oklahoma.

18. Among the rights and powers purportedly granted to GRDA were the powers to control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district.

C. Exercise of Control Over the Water Impounded at the Fort Gibson Reservoir

19. Since the completion of the Fort Gibson Dam and the flooding of land underlying the Fort Gibson Reservoir, GRDA has exercised control over the use of the water impounded at the Fort Gibson Reservoir, in groundwater near the Grand River and in tributaries of the Grand River.

20. The Plaintiffs and individuals or entities desiring to appropriate water from the Fort Gibson Reservoir or from rivers, creeks, streams or other tributaries that flow into the Fort Gibson Reservoir as well as groundwater (subsurface water) have been required to apply to GRDA for permits to take water from these water sources and/or execute contracts with GRDA for the taking and use of raw water.

21. With the exception of Plaintiff, Peggs, each of the Plaintiffs appropriate water from the Fort Gibson Reservoir or from rivers, creeks, streams or tributaries that flow into the Fort Gibson Reservoir. Peggs appropriates water from a water well located on its own property. GRDA requires Peggs to purchase the water taken from Peggs' water well from GRDA.

22. For a number of years, GRDA has charged water appropriators a rate per thousand gallons of water taken from the Fort Gibson Reservoir or its tributaries.

23. In June of 2007, the engineering firm of WDB Engineering, P.L.L.C. conducted a rate study on sales of raw water from the Grand, Hudson and Fort Gibson Reservoirs. Based on this rate study, GRDA announced to water appropriators that it would be increasing its water rates for raw water taken from the Fort Gibson Reservoir and its tributaries.

D. The *United States v. Grand River Dam Authority* Case

24. On June 13, 1960, the Supreme Court of the United States issued its ruling in the case of *United States v. Grand River Dam Authority,* 363 U.S. 229, 80 S.Ct. 1134 (1960).

25. The Supreme Court's Decision originated from claims that GRDA had asserted against the United States in the United States Court of Claims. Specifically, GRDA's claims arose because the United States had condemned a 70 acre tract owned by GRDA when the United States undertook the Fort Gibson project. The United States obtained flowage rights over GRDA's land and made payment for the location of GRDA's transmission lines.

26. GRDA filed suit demanding that the United States pay $10,000,000.00 for the "taking" of its water power rights at Fort Gibson and its franchise to develop electric power and energy at the site.

27. From an adverse judgment by the Court of Claims, the United States appealed to the Supreme Court.

28. On appeal, GRDA argued that it had a vested interest in the waters of the Grand River by virtue of the grant made to it by the State of Oklahoma for the development of hydroelectric power. GRDA argued that the State of Oklahoma had the power and authority to appropriate and vest title to the waters of the Grand River in GRDA because a

deed from the United States to the Cherokee Nation dated December 31, 1838 divested the United States of all its right, title and interest in and to the waters of the Grand River.

29. GRDA also argued that if any water rights in the waters of the Grand River remained in the United States after the grant to the Cherokee Nation in 1838, these rights were later transferred to the State of Oklahoma by virtue of Section 25 of the Act of April 26, 1906 (34 Stat. 137, 146) which granted light and power companies the right to construct dams across non-navigable streams in Cherokee territory for power and other purposes.

30. GRDA contended that it had vested property rights in the waters of the Grand River and that these property rights could not be taken by the United States without just compensation.

31. The Supreme Court disagreed with GRDA's arguments. The Supreme Court found that GRDA could not trace its title to the waters of the Grand River through the grant from the United States to the Cherokee Nation. Specifically, the Supreme Court found that if the title to waters vested in an Indian tribe, Oklahoma took sovereignty over the public lands in the condition of ownership as they existed at the time the State of Oklahoma came into the Union. There was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted the divesting of the title that was granted to the Indian tribe.

32. The Supreme Court also found that Section 25 of the Act of April 26, 1906 (34 Stat. 137, 146) was merely an assertion of power possessed by the Federal Government to regulate Indian Territory; however, no water rights condemned by this Act passed to the State of Oklahoma and from the State of Oklahoma to GRDA.

33. The Supreme Court ultimately concluded that GRDA did not possess any vested property right to the waters of the Grand River. Because GRDA did not possess any vested property right to the waters of the Grand River, no property had been taken by the United States, and GRDA was not entitled to compensation from the United States.

COUNT ONE
DECLARATORY JUDGMENT

34. Plaintiffs incorporate by reference each of the above and foregoing allegations.

35. Plaintiffs seek a declaration that GRDA has no right, title or interest in or to the water impounded at the Fort Gibson Reservoir, the water which flows from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or the subsurface ground water taken from water wells on land near the Fort Gibson Reservoir or its tributaries.

36. Plaintiffs further seek a declaration that GRDA has no right to charge for water that it does not control, store or preserve.

37. Plaintiffs further seek a declaration that GRDA has no right to charge Plaintiffs for water appropriated by Plaintiffs from the Fort Gibson Reservoir, the water which flows from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or the subsurface ground water taken from water wells on land near the Fort Gibson Reservoir or its tributaries.

COUNT TWO
INJUNCTION

38. Plaintiffs incorporate by reference each of the above and foregoing allegations.

39. GRDA has charged Plaintiffs for water taken from the Fort Gibson Reservoir, the water which flows from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or the subsurface ground water taken from water wells on land near the Fort Gibson Reservoir. GRDA has no right, title or property interest in or to the water which it has sold and is continuing to sell (or charge fees for the appropriation of) to the Plaintiffs. Plaintiffs do not have a proper and adequate remedy at law and injunctive relief is a proper remedy to stop GRDA from charging Plaintiffs for the water appropriated and used by the Plaintiffs.

COUNT THREE
UNJUST ENRICHMENT – RESTITUTION

40. Plaintiffs incorporate by reference each of the above and foregoing allegations.

41. GRDA has sold and continues to sell water to the Plaintiffs (and/or charge fees for the appropriation of water) to which GRDA has no right, title or property interest. GRDA has been unjustly enriched by the sale of said water and Plaintiffs are entitled to restitution for all amounts paid to GRDA for said water in an amount in excess of $10,000.00.

PRAYER

Based upon the above and foregoing allegations, Plaintiffs pray for a judgment against the Defendants as follows:

1. A judgment that GRDA has no right, title or interest in or to the water impounded at the Fort Gibson Reservoir, the water which flows from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or the subsurface ground water taken from water wells on land near the Fort Gibson Reservoir or its tributaries

2. A judgment that GRDA has no right to charge for water that it does not control, store or preserve.

3. A judgment that GRDA has no right to charge Plaintiffs for water appropriated

by Plaintiffs from the Fort Gibson Reservoir, the water which flows from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or the subsurface ground water taken from water wells on land near the Fort Gibson Reservoir or its tributaries.

4. A permanent injunction against GRDA restraining GRDA from charging Plaintiffs for water taken by Plaintiffs from the Fort Gibson Reservoir, from any creeks, streams, rivers or tributaries that feed into the Fort Gibson Reservoir, or from water wells on land near the Fort Gibson Reservoir.

5. A Judgment for the return of any and all funds which the Court deems were obtained by GRDA in contravention of Plaintiffs' rights and for which GRDA has been unjustly enriched.

6. A monetary judgment for all damages sustained as a result of GRDA's wrongful actions.

7. A monetary judgment for all attorney's fees, costs and interest associated with this action.

8. Such further and other relief as may be appropriate.

JURY TRAIL DEMANDED

Plaintiffs hereby demand a Jury Trial on all issues properly triable by Jury.

Respectfully submitted,

DOYLE HARRIS
DAVIS & HAUGHEY

/s/ C. Matthew Bickell

Steven M. Harris,
OBA #3913
C. Matthew Bickell,
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(918) 592-1276
(918) 592-4389 (fax)
Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I do hereby certify that on the 11th day of June, 2008, I caused to be mailed a true and correct copy of the above and foregoing instrument to the following parties with proper postage fully prepaid thereon.

James M. Reed
Michael D. Graves
John T. Richer
Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C.
320 S. Boston Ave., Suite 400
Tulsa, OK 74103-3708

/s/ C. Matthew Bickell

APPENDIX 6

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, WAGONER COUNTY RURAL WATER DISTRICT NO. 7, WAGONER COUNTY RURAL WATER DISTRICT NO. 9, CHEROKEE COUNTY RURAL WATER DISTRICT NO. 11, PEGGS WATER COMPANY and TRI-B NURSERY, INC., Plaintiffs/Appellants, vs. GRAND RIVER DAM AUTHORITY, Defendant/Appellee.	Case No. 107,078 Acting conformably to provisions of 12 O.S. § 990 A and Rule 1.4, the Clerk notes that this matter appears to have been mailed (date) 5-27-10

PETITION FOR WRIT OF CERTIORARI

(Filed Jun. 1, 2010)

Plaintiffs/Appellants, Wagoner County Rural Water District No. 2, Wagoner County Rural Water District No. 7, Wagoner County Rural Water District No. 9, Cherokee County Rural Water District No. 11, Peggs Water Company, and Tri-B Nursery, Inc., petition that a writ of certiorari issue to review the decision of the Court of Civil Appeals of the State of Oklahoma, Division II entered on May 7, 2010, affirming the trial court's decision herein.

I. RELEVANT DATES

The Opinion of the Court of Civil Appeals for which Appellants seek review was filed on May 7, 2010. No Petition for Rehearing was filed in the Court of Civil Appeals.

II. REASONS FOR REVIEW

The Court of Civil Appeals has decided a question of substance in a way that is not in accord with applicable decisions by the United States Supreme Court and the Tenth Circuit Court of Appeals. The Court of Civil Appeals determined that "the fundamental right to the water of the Grand River, including that water within the Fort Gibson reservoir, ***belongs*** to the State of Oklahoma and has been transferred to the GRDA." (emphasis added). (Opinion at p. 13). This determination is directly contrary to decisions of the Supreme Court of the United States and the Tenth Circuit Court of Appeals.

The Appellants would further petition that a writ of certiorari issue to review the decision of the Court of Civil Appeals because the decision is not in accord with Oklahoma law.

III. STATEMENT OF FACTS

GRDA was created by the Oklahoma Legislature in 1935 pursuant to 82 O.S. § 861, *et seq.* which conferred on GRDA the right "[t]o control, store and preserve, within the boundaries of the District, the

water of the Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District" and "to develop and generate water power and electric energy within the boundaries of the District." (82 O.S. § 862).

After its creation, GRDA surveyed the Grand River and adopted a plan for the creation of three dams along the Grand River at Pensacola, Markham Ferry and Fort Gibson. *Grand River Dam Authority v. United States*, 175 F.Supp. 153, 155 (CT.CL. 1959). By 1940, GRDA had constructed the Pensacola dam and had acquired lands, easements and rights of way and had constructed transmission lines, substations and other facilities for the connection of the Pensacola project with the dams contemplated at Markham Ferry and Fort Gibson. *Id.* However, before GRDA could build the Fort Gibson Dam, Congress passed the Flood Control Act of 1941 which authorized the construction of three dams along the Grand River by the U.S. *Id.* The U.S. undertook the construction of the Fort Gibson dam on its own and completed its construction in 1950. *Id.*

GRDA owns and operates the Pensacola Dam on Grand Lake and the Markham Ferry Dam on Lake Hudson. *United States v. Grand River Dam Authority*, 363 U.S. 229, 230 (1960). The U.S. acting through its agent, the U.S. Army Corps of Engineers *owns the land underlying the Fort Gibson Reservoir* and it owns and operates the Fort Gibson Dam. *Id.* The Fort Gibson Reservoir extends from the Fort Gibson Dam on the South to a point on the North side of the

reservoir that is less than a mile from the Markham Ferry Dam.

Four of the Plaintiffs appropriate water *directly from the Fort Gibson Reservoir* (i.e. water standing on land owned by the Army Corps of Engineers). Cherokee County Rural Water District No. 11 appropriates water from a creek or stream that passes over and through its land and flows into the Fort Gibson Reservoir. Peggs Water Company appropriates subsurface ground water from a *water well on its own land*. None of the Plaintiffs appropriate water from any point *above* where the Grand River enters the Fort Gibson Reservoir or any water standing on land owned by GRDA.

IV. THE STATE OF OKLAHOMA DOES NOT "OWN" THE WATER FLOWING IN THE GRAND RIVER OR ANY OTHER NON-NAVIGABLE STREAM FLOWING WITHIN THE STATE AND THEREFORE GRDA HAS NO RIGHT TO SELL WATER FROM THE GRAND RIVER OR ITS TRIBUTARIES

In its analysis, the Court of Civil Appeals states that "[t]he dispositive issue in this appeal requires a determination of the ownership of the water sold by the GRDA to the Water Districts. If the GRDA owns the right to sell the water at issue, then the Water Districts cannot state any cognizable legal theory to support their claim, and the district court properly dismissed their petition." (Opinion at p. 4). If the

reasoning of the Court of Appeals is correct (i.e. if the State owns the water, it has the right to sell the water or convey ownership to GRDA) then the reverse is true. If the State does not own the water, then it does not have the right to sell the water or convey ownership to GRDA.[1]

The Court of Civil Appeals premised its affirmance of the trial court's decision on the concept of state ownership of the water at issue; however, this conclusion is directly contrary to previous decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals which have both concluded that the State of Oklahoma does not possess an "ownership interest" in the water resources located within its boundaries.

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[1] It is a fundamental principal of agency law that a principal may only do through an agent those things that he may lawfully do personally. *Restatement (Second) of Agency § 17.* A principal may not delegate to his agent or nominee authority which he himself does not possess. *Restatement (Second) of Agency § 20.* "In other words, an 'individual may not create an agent who has greater power than the individual himself possesses.'" *U.S. v. Craig*, 896 F.Supp. 85, 89 (N.D.N.Y.,1995). This rule applies not only in the typical principal-agent context but applies equally to an agency of the government. See *U.S. v. Johns*, 336 F.Supp.2d 411, 420 at n. 9 (M.D.Pa.,2004) ("Although this authority was delegated to an agency, the United States Sentencing Commission, the agent can exercise no greater constitutional power than the principal."); See also, *Grand River Dam Authority v. U.S.*, 175 F.Supp. 153, 158 (CT.CL. 1959) (Judge Whitaker notes in his dissenting opinion that "[GRDA], the state's agent, of course has no greater right than its creator, the State of Oklahoma.")

The Court of Civil Appeals has essentially confused the State's police power to regulate the use of non-navigable water within the State with an ownership interest in the water which would allow the State (as the owner of the water) the right to sell the water. The Court of Civil Appeals first cites to *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 28 S. Ct. 529 (1908) for the proposition that states "own" the superior right to non-navigable water. Although the *Hudson County* case does articulate that the public has an interest in the state *maintaining* the rivers within the state, the case does not stand for the proposition that a state "owns" the non-navigable water within its boundaries.

Hudson County also does not support the theory of state ownership because it is based on the Supreme Court's earlier decision in *Geer v. Connecticut*, 161 U.S. 519, 16 Sup. Ct. Rep. 600 (1896). "*Geer*, which sustained a Connecticut ban on the interstate transportation of game birds captured in that State, was premised on the theory that the State owned its wild animals and therefore was free to qualify any ownership interest it might recognize in the persons who capture them." *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 950, 102 S.Ct. 3456, 3461 (1982). In *Hughes v. Oklahoma,* 441 U.S. 322, 99 S.Ct. 1727 (1979), the Supreme Court expressly overruled *Geer* and "traced the demise of the public ownership theory and definitively recast it as 'but a ***fiction*** expressive in legal shorthand of the importance to its people that a State have power to ***preserve and regulate*** the

exploitation of an important resource,'" *Sporhase*, 458 U.S. at 950-951. (emphasis added).

In *Hughes,* the owner of a commercial minnow business in Texas was arrested for transporting natural minnows seined from the waters of Oklahoma to Texas for resale in violation of an Oklahoma statute. *Hughes*, 441 U.S. at 323-324. Hughes challenged the statute as unconstitutional because it was repugnant to the Commerce Clause. *Id.* at 324. The Oklahoma Court of Criminal Appeal affirmed, stating:

> "'The United States Supreme Court has held on numerous occasions that the wild animals and fish within a state's border are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all its people. ***Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that may be acquired therein***. *Lacoste v. Department of Conservation*, 263 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437 (1924); *Geer v. State of Connecticut,* 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896). . . . As stated in *Lacoste, supra*, protection of the wildlife of a state is peculiarly within the police power of the state, and the state has great latitude in determining what means are appropriate for its protection.'" (emphasis added).

Id.

In reversing the decision of the Oklahoma Court of Criminal Appeals, the United States Supreme Court looked to the decision in *Geer* and cases decided subsequent to *Geer*. The Supreme Court noted that the decision in *Geer* rested on the holding that no interstate commerce was involved. In reaching this conclusion, the Court stated:

> This conclusion followed in turn from the view that the State had the power, as representative for its citizens, who "owned" in common all wild animals within the State, to control not only the *taking* of game but also the *ownership* of game that had been lawfully reduced to possession. By virtue of this power, Connecticut could qualify the ownership of wild game taken within the State by, for example, prohibiting its removal from the State: "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose." Accordingly, the State's power to qualify ownership raised serious doubts whether the sale or exchange of wild game constituted "commerce" at all; in any event the Court held that the qualification imposed by the challenged statute removed any transactions involving wild game killed in Connecticut from *interstate* commerce. (internal citations omitted).

Hughes, 441 U.S. at 327.

The Supreme Court in *Hughes* then noted that the view of the *Geer* dissenters became the predominant

view in subsequent cases. *Id.* at 329. In *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740 (1977), the Supreme Court rejected the argument that Virginia's "ownership" of fish swimming in its territorial waters empowered the State to forbid fishing by federally licensed ships owned by nonresidents while permitting residents to fish. In reaching this conclusion, the Supreme Court explicitly embraced the analysis of the *Geer* dissenters stating:

> "A State does not stand in the same position as the owner of a private game preserve and *it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures* ***until they are reduced to possession by skillful capture****. . . . Geer v. Connecticut*, 161 U.S. 519, 539-540, 16 S.Ct. 600, 608, 40 L.Ed. 793 (1896) Field, J., dissenting). The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' (emphasis added).

Hughes, 441 U.S. at 334-335.

Pursuant to this authority, neither the State of Oklahoma nor GRDA "own" the water flowing within the Grand River or its tributaries until such water has been reduced to physical possession. Thus, GRDA

only has the right to sell that water which it has acquired true control and possession over.

The Supreme Court revisited the State "ownership" theory with regard to subsurface groundwater in *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 950, 102 S.Ct. 3456, 3461 (1982). *Sporhase* involved an appeal from the Supreme Court of Nebraska relating to a Nebraska statute that imposed a reciprocity requirement on subsurface ground water that was intended to be transported from Nebraska to another state.[2] *Id.* at 941. The Nebraska Supreme Court found the groundwater not to be an article of commerce relying on *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 28 S.Ct. 529 (1908) (the same case relied on by the Court of Civil Appeals for the proposition that the State of Oklahoma owns the waters within its boundaries). The United States Supreme Court rejected the Nebraska Supreme Court's conclusion that the subsurface groundwater was not an article of commerce based on its prior decisions that the public ownership theory was "but a fiction expressive in legal shorthand of the importance that a State have power to preserve and regulate the exploitation of an important resource." *Sporhase*, 458 U.S. at 950-954.

Following these decisions, the issue of State ownership of water arose again in the Western District of

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[2] One of the Appellants here takes water from a well (i.e., subsurface ground water).

Oklahoma in the case of *Tarrant Regional Water Dist. v. Herrmann*, 2007 WL 3226812 (W.D.Okla.,2007). In *Tarrant*, a Texas water district brought suit against members of the Oklahoma Water Resources Board ("OWRB") seeking a declaration that certain laws limiting the export of water out of the State of Oklahoma were invalid because they were preempted by the Red River Compact and violated the Commerce Clause of the Constitution. *Id.* at *1.

The OWRB moved to dismiss on various grounds including the *Younger* abstention doctrine. *Id.* The Court noted that the *Younger* abstention doctrine required a federal court to abstain from hearing a case where three criteria were met: "[1] an ongoing state judicial (or in a proper case administrative) proceeding, [2] the presence of an important state interest, and [3] an adequate opportunity to raise federal claims in the state proceedings." *Id.* at *5. As to the second element the District Court stated:

> Similarly, the court concludes a sufficiently important state interest, as contemplated by the *Younger* doctrine, is not present here so as to warrant abstention. It is unquestionably true that Oklahoma has a substantial and important interest in regulating the use of water that flows through it. ***Although that interest is not properly grounded in a concept of state ownership of the water, in a strict property law sense***, its interest in managing this important resource is nonetheless a substantial interest. *See*

> *Sporhase v. Nebraska*, 458 U.S. 941, 950-1 (1982).[FN7]
>
> * * *
>
> FN7. *Sporhase* dealt with ground water rather than surface water. However, the court's discussion of *Hudson County Water Company v. McCarter*, 209 U.S. 349 (1908), and *City of Altus v. Carr*, 255 F.Supp. 828 (WD Tex.), summarily affirmed 385 U.S. 35 (1966), and its overruling of *Geer v. Connecticut*, 161 U.S. 519 (1896), upon which *Hudson County* was based, clearly suggest the same principles would apply to surface water. (emphasis added).

Id. at *6.

On appeal, the OWRB challenged the District Court's denial of its Motion to Dismiss under the *Younger* abstention doctrine. The Tenth Circuit interpreted the OWRB's argument as follows:

> The defendants' argument appears to be based on two related premises: (1) that the relief requested in this case makes the suit analogous to the quiet title action in *Coeur d'Alene,* and (2) ***that invalidating the anti-export laws would encroach on Oklahoma's "ownership" interests in its natural resources***, much like a favorable judgment would have done in *Coeur d'Alene*. (emphasis added).

Tarrant Regional Water Dist. v. Sevenoaks, 545 F.3d 906, 913 (C.A.10 (Okla.),2008). In addressing the second argument, the Tenth Circuit concluded:

> ***It is also well-established that Oklahoma does not enjoy an "ownership interest" in water resources located in the state***. *See Sporhase v. Nebraska*, 458 U.S. 941, 950-52, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982). (emphasis added).

Tarrant Regional Water Dist. v. Sevenoaks, 545 F.3d at 913.

The Court of Civil Appeals concluded that " . . . the fundamental right to the water of the Grand River, including that water [situated on the land owned by the Army Corps of Engineers] within the Fort Gibson reservoir, belongs to the State of Oklahoma and has been transferred to GRDA." (Opinion at p. 13). This conclusion is directly contrary to the decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals. Pursuant to those decisions,[3] the State of Oklahoma does not "own" the water within its boundaries and therefore cannot "sell" the water within its boundaries nor "sell" water which has accumulated on the land of

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[3] *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 102 S.Ct. 3456 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727 (1979), *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740 (1977); *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906 (C.A.10 (Okla.),2008).

others.[4] Because the decision of the Court of Civil Appeals is based on the erroneous conclusion that the State of Oklahoma owns the water in the Grand River, its decision must be reversed and remanded.

V. GRDA HAS NO AUTHORITY TO SELL WATER TAKEN FROM WATER WELLS ON PRIVATE LAND

The Court of Civil Appeals conceded that Peggs Water Company appropriates subsurface water from a well located on its property. (Opinion at p. 4). Although not directly addressing the issue, it appears from its Opinion that the Court of Civil Appeals believes that GRDA can sell water from any source within its territory.[5] There is no statutory authority for GRDA to claim ownership of subsurface water taken from wells situated on land owned by another (Peggs Water Company here). Correspondingly, GRDA has no right to sell to Peggs Water Company water that already belongs to Peggs Water Company.

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[4] Moreover, in *United States v. Grand River Dam Authority*, 363 U.S. 229, 80 S.Ct. 1134 (1960), the United States Supreme Court noted that GRDA had failed to trace Oklahoma's title to ownership of the waters of the Grand River and could not show any specific grant of title from the United States to the State. *Id.* at 233-235.

[5] At p. 4 of its Opinion, the Court of Civil Appeals states "[a]ll of the water taken by the Water Districts comes from within the conservation and reclamation district (the Grand River water district) established by the State of Oklahoma to preserve, protect and distribute the waters of the Grand River.

82 O.S. § 862 provides as follows:

> The district shall have and is hereby authorized to exercise the following powers, rights and privileges:
>
> (a) To control, store and preserve, within the boundaries of the district, ***the waters of Grand River and its tributaries***, for any useful purpose, and to use, distribute and ***sell the same*** within the boundaries of the district . . .

(emphasis added).

To the extent that this statute provides GRDA with the authority to sell water from the Grand River or its tributaries (which Appellants expressly challenge), it does not grant GRDA any authority to assert ownership over nor sell subsurface water taken from water wells. The statute specifically limits GRDA's authority to water within the Grand River and its tributaries. The statute does not purport to grant GRDA authority over all water within its district but only that water within the Grand River and its tributaries. Accordingly, GRDA has no authority to sell water appropriated by a land owner from water wells on private land and the decision of the Court of Civil Appeals as to Peggs Water Company must be reversed and remanded.

VI. CONCLUSION

Appellants respectfully urge this Court to issue its Writ of Certiorari to review the Opinion of the Court of Civil Appeals of the State of Oklahoma, Division II entered herein on May 7, 2010.

Respectfully submitted,

DOYLE HARRIS DAVIS & HAUGHEY

/s/ C. Matthew Bickell

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CERTIFICATE OF SERVICE

I, C. Matthew Bickell, hereby certify that on the 7th day of May, 2010, I mailed a true and correct copy of the foregoing Petition for Writ of Certiorari to the following persons by depositing it in the U.S. Mail, postage prepaid:

James M. Reed
Michael D. Graves
John T. Richer
Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C.
320 S. Boston Ave., Suite 400
Tulsa, OK 74103-3708

I further certify that a copy of the Petition for Writ of Certiorari was mailed to, or filed in, the Office of the Craig County Court Clerk on the 27th day of May, 2010.

/s/ C. Matthew Bickell
C. Matthew Bickell

THIS OPINION HAS BEEN RELEASED
FOR PUBLICATION BY ORDER OF
THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION II

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, WAGONER COUNTY RURAL WATER DISTRICT NO. 7, WAGONER COUNTY RURAL WATER DISTRICT NO. 9, CHEROKEE COUNTY RURAL WATER DISTRICT NO. 11, PEGGS WATER COMPANY and TRI-B NURSERY, INC.,	)	Case No. 107,078
Plaintiffs/Appellants,	)	(Filed May 7, 2010)
vs.	)	
GRAND RIVER DAM AUTHORITY,	)	
Defendant/Appellee.	)	

APPEAL FROM THE DISTRICT COURT
OF CRAIG COUNTY, OKLAHOMA

HONORABLE TERRY H. MCBRIDE, TRIAL JUDGE

AFFIRMED

Steven M. Harris
C. Matthew Bickell
DOYLE HARRIS DAVIS
& HAUGHEY
Tulsa, Oklahoma For Plaintiffs/Appellants

James M. Reed
John T. Richer
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
Tulsa, Oklahoma For Defendant/Appellee

OPINION BY JOHN F. FISCHER, PRESIDING JUDGE:

¶1 Wagoner County Rural Water District No. 2, Wagoner County Rural Water District No. 7, Wagoner County Rural Water District No. 9, Cherokee County Rural Water District No. 11, Peggs Water Company and Tri-B Nursery, Inc., (Water Districts), appeal from an order of the district court dismissing their First Amended Petition. The appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S. Supp. 2008, ch. 15, app. 1, and the matter stands submitted without appellate briefing. Based on our review of the record and applicable law, we affirm.

BACKGROUND

¶2 Each of the Water District plaintiffs is required to pay the Grand River Dam Authority for water. The Water Districts filed suit alleging that the GRDA does not have any rights to the water for which they are

being charged. The GRDA moved to dismiss pursuant to 12 O.S. Supp. 2004 § 2012(B)(6), arguing that the Water Districts' petition failed to state a claim on which relief could be granted.[1] The district court's order granting the GRDA's motion to dismiss is the subject of the Water Districts' appeal.

STANDARD OF REVIEW

¶3 Appellate review of GRDA's motion to dismiss is governed by the standard set forth in *National Diversified Business Services, Inc. v. Corporate Financial Opportunities, Inc.*, 1997 OK 36, ¶ 9, 946 P.2d 662, 665-66:

> A motion to dismiss for failure to state a claim upon which relief can be granted may not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the stated claim for relief.

Id. at ¶ 9, 946 P.2d at 665 (footnotes omitted). Where, as here, evidentiary materials are attached to a section 2012(B)(6) motion or response, a court must convert the motion into one for summary judgment. *Id.*, 946 P.2d at 365-66.

> A motion for summary disposition submits the controversy to the court for application of

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[1] The GRDA also asserted 12 O.S. Supp. 2004 § 2012(b)(7), failure to join an indispensable party, as a basis for its motion. That issue is not pertinent to our disposition of this appeal.

> the pertinent law to uncontroverted facts. The tendered evidentiary materials will warrant summary relief if all material facts are undisputed and supportive of but a single inference that favors the movant.

Id., 946 P.2d at 666. A district court's order granting a motion for summary judgment resolves only a question of law. *Id.* at n.18, 946 P.2d at 666 n.18. Accordingly, we will review *de novo* the district court's order, dismissing this case for failure to state a claim on which could be granted. *Id.* at ¶ 9, 946 P.2d at 666. *See also Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053.

ANALYSIS

¶4 The dispositive issue in this appeal requires a determination of the ownership of the water sold by the GRDA to the Water Districts. If the GRDA owns the right to sell the water at issue, then the Water Districts cannot state any cognizable legal theory to support their claim, and the district court properly dismissed their petition.

¶5 The material facts in this case are not in dispute. The four water districts were organized pursuant to the Rural Water, Sewer, Gas and Solid Waste Management Districts Act, 82 O.S. 2001 §§ 1324.1-1324.35. Peggs Water Company and Tri-B Nursery, Inc., are Oklahoma corporations. The four rural water districts and Tri-B Nursery appropriate water from

Fort Gibson Reservoir or its tributaries. Peggs appropriates sub-surface water from a well located on its property. All of the water taken by the Water Districts comes from within the conservation and reclamation district (the Grand River water district) established by the State of Oklahoma to preserve, protect and distribute the waters of the Grand River. The Grand River is a non-navigable water. The Arkansas river, into which the Grand River flows, is a navigable stream.

The GRDA was created in 1935.

> There is hereby created within the State of Oklahoma a conservation and reclamation district to be known as "Grand River Dam Authority", hereinafter called the district, and consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Ottawa, Osage, Pawnee, Payne, Lincoln, Logan, Tulsa, Wagoner, Sequoyah, Haskell, Latimer, Pittsburg, McIntosh, Creek, Okmulgee, Nowata, Washington and Rogers. Such district shall be, and is hereby declared to be, a governmental agency of the State of Oklahoma, body politic and corporate, with powers of government and with the authority to exercise the rights, privileges and functions hereinafter specified, including the control, storing, preservation and distribution of the waters of the Grand River and its tributaries, for irrigation, power and other useful purposes and reclamation and irrigation of arid,

> semiarid and other lands needing irrigation, and the conservation and development of the forests, minerals, land, water and other resources and the conservation and development of hydroelectric power and other electrical energy, from whatever source derived, of the State of Oklahoma.

82 O.S.2001 § 861. The GRDA is authorized to "control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district." 82 O.S.2001 § 862(a). Nonetheless, the Water Districts argue that the GRDA does not "control, store and preserve" the water they are being sold. That argument is alternatively based on an interpretation of a United States Supreme Court decision and interpretation of Oklahoma statutes.

I. The Federal Law Argument

¶6 The right to water consists of two basic but not mutually exclusive interests. One is public and the other private. As to the public interest, the general rule is that the United States owns the superior right to navigable water. *See e.g., U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62, 33 S. Ct. 667, 671 (1913), in which the Supreme Court held that title to real property:

> is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of

> no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the states and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress.

Generally, states own the superior right to non-navigable water.

> [F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 356, 28 S. Ct. 529, 531 (1908).

¶7 The private interest consists of two rights, riparian and appropriative. *Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, 1990 OK 44, ¶¶ 14 and 23, 855 P.2d 568, 575-77.[2] And, although these private

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[2] *Cf.*, Oklahoma's Waters and Water Rights Act: "It is the intent of the Oklahoma Legislature that the purpose of Section 105.1 through Section 105.32 of this title is to provide for stability and certainty in water rights by replacing the incompatible dual systems of riparian and appropriative water rights which governed the use of water from definite streams in Oklahoma prior to June 10, 1963, with an appropriation system

(Continued on following page)

interests are balanced by "relative reasonableness," *id.* at ¶ 27, 855 P.2d at 578, Oklahoma's "power to control unappropriated public waters is plenary. Definite nonnavigable streams are public waters. The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes." *Oklahoma Water Res. Bd. v. Cent. Okla. Master Conservancy Dist.*, 1968 OK 73, ¶ 14, 464 P.2d 748, 753. Further, "[t]he Legislature may exercise its police power to protect the state's water irrespective of the rights of private owners of the land most immediately concerned." *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶ 23, 148 P.3d 842, 849-50. Pursuant to this plenary power, the Oklahoma Legislature clearly granted to the GRDA the right to "control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries." 82 O.S.2001 § 862(a). The Water Districts, however, do not claim a superior riparian or appropriative right. They argue that the United States Supreme Court determined in 1960 that the GRDA does not own any rights to the Fort Gibson portion of the Grand River

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of regulation requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that riparian landowners may use water for domestic uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriative, existing prior to June 10, 1963, and to extinguish future claims to use water, except for domestic use, based only on ownership of riparian lands." 82 O.S.2001 § 105.1A.

water district, the source of the water they appropriate from the Grand River water district.

¶8 In 1956, the GRDA sued the United States over the right to generate electric power from the Fort Gibson reservoir. The GRDA had recovered compensation when Fort Gibson dam was built for a 70-acre tract of land condemned, for the flow of the Grand River over that land, and for the costs of relocating its electric power transmission lines. The GRDA also claimed it had been deprived of its exclusive power to generate hydroelectric power within the Grand River water district. The Court of Claims found that the Government was liable for taking the GRDA's water power rights, and the Government appealed. The decision on which the Water Districts rely, *United States v. Grand River Dam Auth.*, 363 U.S. 229, 80 S. Ct. 1134 (1960), resolved the litigation. The GRDA argued that, although the federal government had the right to navigable waters, the Grand River was a non-navigable stream over which the State of Oklahoma had control. It was not disputed that Oklahoma had conferred its right to the water within the Grand River water, district, as well as the franchise right to generate electric power from that water, to the GRDA. The GRDA operates electric generating facilities at the Pensacola and Markham Ferry dams, and claimed the right to do so at Fort Gibson, the most downstream of the three dams on the Grand River. Therefore, the GRDA claimed that the federal government's operation of the electric generating facility

at Fort Gibson constituted a "taking" for which the GRDA was entitled to be compensated.

¶9 The three dam projects on the Grand River had been incorporated into the Flood Control Act by Congress in 1941. Fort Gibson was completed as "an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of power on the Arkansas and its tributaries." *Id.* at 230, 80 S. Ct. at 1135. Although recognizing state ownership of non-navigable waters, the Supreme Court found "no constitutional reason why Congress cannot, under the commerce power treat the watersheds as a key to flood control on navigable streams and their tributaries." *Id.* at 232, 80 S. Ct. at 1136. Pursuant to the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, the Court found this interest "superior" to any state interest. Relying on *Omnia Commercial Co. v. United States,* 261 U.S. 502, 43 S. Ct. 437 (1923), for the proposition that many laws and rulings by the federal government reduce the value of property held by individuals, the Court held that the "Court of Claims erred in failing to distinguish between an appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power." *Grand River Dam*, 363 U.S. at 236, 80 S. Ct. at 1138.

¶10 This case does not hold, as the Water Districts argue, that the GRDA failed to prove that it had any right to the water in the Fort Gibson reservoir. In fact, the Supreme Court specifically refused to reach the issue argued by the United States: the federal

government's right to navigable water preempts state created property rights to non-navigable water. The case merely holds that the right of the GRDA to produce electricity from the Fort Gibson reservoir was inferior to the right of the federal government to do so.

¶11 As previously discussed, many and often competing interests may have legitimate claims to the same water. The fact that one interest may be superior to another does not extinguish the inferior interest; it merely establishes the priority of the superior use. Further, "the existence of unexercised federal regulatory power does not foreclose state regulation of its water resources, [or] of the uses of water within the state. . . ." *Sporhase v. Nebraska,* 458 U.S. 941, 954, 102 S. Ct. 3456, 3463 (1982) (invalidating a state statute restricting the use of groundwater outside the state). Mutual, complimentary use of water is contemplated by Oklahoma law. *Franco-American,* 1990 OK 44 at ¶ 14, 855 P.2d at 575-76. It is also contemplated by federal law. In *Pennsylvania v. Wheeling & Belmont Bridge* Co., 59 U.S (18 How.) 421 (1855), the Supreme Court held that a bridge over the Ohio river, constructed pursuant to a Virginia statute, created an obstruction to navigation that should be removed. Before the decree was executed, Congress declared the bridge a lawful structure and the Court refused to order removal of the bridge.

> Although it still may be an obstruction in fact, [it] is not so in contemplation of law. We have already said, and the principle is undoubted,

> that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and Federal, which, if not sufficient, certainly none can be found in our system of government.

Id. at 430. Consequently, the ruling in *United States v. Grand River Dam Authority* cannot be extended to support the Water Districts' position that the government's right to build a flood control dam and produce electricity at Fort Gibson precludes any other complimentary use of the water by the GRDA, or preempts all other rights previously granted the GRDA by the State of Oklahoma to the water in the Fort Gibson reservoir, its streams, tributaries and associated groundwater.

¶12 Finally, the Water Districts' reliance on 82 O.S.2001 § 105.21 does not advance their argument. That statute provides, in part:

> The owner of any works for the storage, diversion or carriage of water, which contain water in excess of his needs for irrigation or other beneficial use for which it has been appropriated, shall be required to deliver such surplus, at reasonable rates for storage or

> carriage, or both, as the case may be, to the parties entitled to the use of the water for beneficial purposes. . . .

¶13 The Water Districts argue that section 105.21 conveys to the United States ownership of, or at least the right to sell, water in the Fort Gibson reservoir, because the federal government owns the Fort Gibson dam. No other authority is cited for this proposition and no reported case has interpreted this statute. Nonetheless, the Water Districts' construction is irreconcilable with other provisions in the Waters and Water Rights Act. Section 105.9 requires that any "federal governmental agency . . . intending to acquire the right to the beneficial use of any water shall . . . before taking the same from any constructed works, make an application to the Board. . . ." Section 105.29 requires officers of the United States "authorized by law to construct works for the utilization of waters within the state" to notify the Water Resources Board of their intent to utilize specified water within the State. The Board may approve, reduce or reject the United States' intended utilization. The fact that the United States has the right to build a dam for flood control and hydroelectric generating purposes does not establish the federal government's ownership of the water affected. As previously discussed, the fundamental right to the water of the Grand River, including that water within the Fort Gibson reservoir, belongs to the State of Oklahoma and has been transferred to the GRDA. The Water

Districts therefore fail to establish that the United States has the right to sell the water at issue.

II. The State Law Argument

¶14 The Water Districts' State law argument relies on two statutes. The first, 82 O.S.2001 § 887, provides: "[T]he waters of Grand River in Oklahoma and the Pensacola and Markham Ferry Reservoirs, located thereon, be and are hereby determined and declared to be non-navigable and waters of the State of Oklahoma." Because this statute was enacted in 1963, thirteen years after the construction of the Fort Gibson dam, the Water Districts conclude that the Legislature, by its omission of any reference to the Fort Gibson reservoir, intended to exclude waters below the Markham Ferry dam from the authority of the GRDA. The second statute, 82 O.S.2001 § 890, provides: "The Grand River Dam Authority shall have no control over that portion of the Grand River downstream from Fort Gibson Dam to the point of confluence of the waters of the Grand River with those of the Arkansas River." With the specific exclusion of water between the Fort Gibson dam and the Arkansas river, the Water Districts conclude that the Legislature also intended to exclude the water from which the excluded waters were derived, in their view, the Fort Gibson reservoir.

¶15 Other than these statutory citations, the Water Districts cite no authority to support their construction of these statutes. Nonetheless, principles of statutory construction are generally accepted.

> The determination of legislative intent controls statutory interpretation. The intent is ascertained from the whole act based on its general purpose and objective. In construing statutes, relevant provisions must be considered together whenever possible to give full force and effect to each. To ascertain intent, we look to the language of the pertinent statute. We presume that the Legislature intends what it expresses. Except when a contrary intention plainly appears, terms are given their plain and ordinary meaning.

Oklahoma Ass'n For Equitable Taxation v. City of Oklahoma City, 1995 OK 62, ¶ 5, 901 P.2d 800, 803 (footnotes omitted). With respect to the Water Districts' section 887 argument, it is true, as a general rule, that the failure to include an item evidences an intent to omit the item. "[T]he general rule is that nothing may be read into a statute which was not within the manifest intention of the legislature as gathered from the language of the act" *Stemmons, Inc. v. Universal C.I.T. Credit Corp.,* 1956 OK 221 ¶ 19, 301 P.2d 212, 216. *See also McSorley v. Hertz Corp.,* 1994 OK 120, ¶ 19, 885 P.2d 1343, 1346 (legislative omission is evidence of intent not to cover the omitted subject). Nonetheless, "[w]hen construing statutes, all relevant provisions must be considered together, where possible, so that force and meaning is

given to each." *Dana P. v. State,* 1982 OK 140, ¶ 23, 656 P.2d 253, 258. Further, "in the construction of statutes to determine legislative intent, the entire act may be considered, together with all other enactments on the same subject, and when the intention of the Legislature can be gathered from the entire statute, words may be modified, altered, or supplied to give the statute the force and effect intended." *Charlson v. State ex rel. Dep't of Pub. Safety,* 2005 OK 83, ¶ 10, 125 P.3d 672, 675.

¶16 First, the Water Districts' construction of section 890 is inconsistent with its interpretation of section 887. The water flowing out of Fort Gibson reservoir and excluded from GRDA authority pursuant to section 890 flowed into that reservoir from waters included within the Grand River water district, and waters that the Water Districts concede are specifically included within the GRDA's authority pursuant to section 887. Although the authority of the GRDA over water below the Fort Gibson dam may be limited, the non-navigable nature of that water does not change until it reaches the Arkansas River.

¶17 Second, the Water Districts' construction of section 887 is unacceptably narrow. The designation of particular waters, the Pensacola and Markham Ferry reservoirs, as non-navigable does not require the conclusion that all reservoirs not designated are navigable. This is particularly true when the statute begins with the designation of the Grand River as non-navigable. The State's ownership depends on the

non-navigable nature of the water, not the State's articulation of that fact.

¶18 Third, the Water Districts' construction of section 887 fails to reconcile the authority granted to the GRDA pursuant to sections 861 and 862:

> There is hereby created within the State of Oklahoma a conservation and reclamation district to be known as "Grand River Dam Authority" . . . consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Ottawa, Osage, Pawnee, Payne, Lincoln, Logan, Tulsa, Wagoner, Sequoyah, Haskell, Latimer, Pittsburg, McIntosh, Creek, Okmulgee, Nowata, Washington and Rogers.

Within that district, the GRDA has the right to "the control, storing, preservation and distribution of the waters of the Grand River and its tributaries." 82 O.S.2001 § 861. It is undisputed that the Fort Gibson reservoir is within the Grand River conservation and reclamation district. The statute creating the GRDA and defining its functions is "an express appropriation by the state of the waters in Grand River to be applied to the uses therein stated, and to place in its said agency exclusive authority to develop the stream in the manner therein provided." *Grand-Hydro v. Grand River Dam Auth.*, 1943 OK 158, ¶ 18, 139 P.2d 798, 801. There is only one exception to the authority granted the GRDA to control the waters of the Grand River; "any municipal corporation within the area

included within the jurisdiction of the said Grand River Dam Authority shall be entitled to take water from the Grand River and any of its tributaries in any quantities that may be needed by such municipal corporation." 82 O.S. Supp. 2008 § 862(a). None of the Water Districts is a municipal corporation, and we will not "read into" the statute an exception the Legislature did not create.

¶19 Finally, the GRDA has been charging, and the Water Districts have been paying the GRDA, for the water at issue for a substantial period of time even before the Water Districts began their legal challenges to the GRDA's right to do so.

> It is a well settled rule that the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. The courts are especially reluctant to overturn a long standing executive or departmental construction where great interests have grown up under it and will be disturbed or destroyed by the announcement of a new rule, or where parties who have contracted with the government upon the faith of such construction will be prejudiced.

Oral Roberts Univ. v. Oklahoma Tax Comm'n, 1985 OK 97, ¶ 10, 714 P.2d 1013, 1015 (quoting *McCain v. State Election Bd.*, 1930 OK 323, ¶ 16, 289 P. 759,

762-63). We find no reason to overturn the GRDA's construction of these statutes.

CONCLUSION

¶20 The GRDA was created by the State of Oklahoma and vested with the right to control, store, preserve and distribute the waters of the Grand River and its tributaries. Included among those rights is the right to sell water to the Water Districts. No superior right held by the United States affects or supersedes the right of the GRDA to do so. Consequently, the Water Districts can state no claim entitling them to relief based on the facts alleged in their First Amended Petition. The Order of the district court dismissing that petition is affirmed.

¶21 **AFFIRMED.**

WISEMAN, C.J., and BARNES, J., concur.

May 7, 2010

Supreme Court, U.S.
FILED
DEC 22 2010
OFFICE OF THE CLERK

(2)

No. 10-578

In the Supreme Court of the United States

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, ET AL.,

Petitioners,

v.

GRAND RIVER DAM AUTHORITY, an agency of the State of Oklahoma,

Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals of Oklahoma, Second Division

BRIEF IN OPPOSITION

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December 22, 2010

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QUESTIONS PRESENTED

I. This case presents a dispute between an agency of the State of Oklahoma and various Oklahoma rural water districts and private parties over rights to the use of the waters of the Grand River, which is a non-navigable stream that is located wholly within the State of Oklahoma. Is there jurisdiction to review the state court decision below under these facts pursuant to 28 U.S.C. § 1257(a)? More specifically, does this dispute involving *intrastate* parties and property present a federal question under the Commerce Clause of the United States Constitution, U.S. Const., Art. I, § 8, cl. 3 (the "Commerce Clause"). Likewise, does this dispute present a federal question under the "federal common law" that should be adjudicated in this Court?

II. Petitioners contend in their Petition For A Writ of Certiorari to this Court ("Petition") that the decision of the Oklahoma Court of Civil Appeals ("State Appeals Court") wrongly decided Respondent's "ownership" in the waters of the Grand River. They also contend that the State Appeals Court misinterpreted Respondent's rights under state law, which expressly permits Respondent to sell Petitioners water from the Grand River. Petitioners contend that the State Appeals Court's decision on these points is "repugnant" to the Commerce Clause. Petitioners suggest that this alleged unconstitutionality supports appellate jurisdiction in this Court under Section 1257(a). However, Petitioners never "pressed" any constitutional challenge under the Commerce Clause to any state court below, and those courts did not "pass upon" that issue. Does this Court have jurisdiction under these circumstances to hear Petitioners' appeal?

III. Did the written decision of the State Appeals Court from which Petitioners appeal (the "State Court Decision") rest upon independent and adequate state law grounds?

LIST OF PARTIES

The Petitioners are:

Wagoner County Rural Water District No. 2;
Wagoner County Rural Water District No. 7;
Wagoner County Rural Water District No. 9;
Cherokee County Rural Water District No. 11;
Peggs Water Company; and
Tri-B Nursery, Inc.

The Respondent is:

Grand River Dam Authority, an agency of the State of Oklahoma

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STATEMENT OF JURISDICTION

Petitioners allege without any elaboration that jurisdiction of their appeal herein is proper under 28 U.S.C. § 1257. Pet. 2. Respondent agrees this provision controls whether this Court has jurisdiction over Petitioners' appeal. Respondent disagrees that Petitioners have properly invoked this provision for the reasons explained *infra*.

STATEMENT OF THE CASE

The Grand River is a non-navigable stream that is located wholly within the State of Oklahoma. In 1935, the Oklahoma Legislature passed the Grand River Dam Authority Act, Okla. Stat. tit. 82, § 861 *et seq.* (the "Act"), which created a "conservation and reclamation district for the waters of the Grand River." The Act further created and authorized Respondent Grand River Dam Authority, *inter alia*, to "control, store and preserve ... the water of the Grand River and its tributaries for any useful purpose and to use, distribute and sell the same within the boundaries of the district. ..." *Id.*, § 862.

Petitioners consist of rural water districts and related end users located in Northeastern Oklahoma. They have purchased water from the Grand River from Respondent under permit for decades and without complaint. Beginning in 2007, Petitioners decided they no longer needed to pay for the water that the Act expressly authorizes Respondent to sell them. Therefore, Petitioners sued Respondent in the United States District Court for the Northern District of Oklahoma. They sought injunctive relief prohibiting Respondent from selling them water from the Grand

River, a declaration that Respondent does not own the water, and recoupment of all monies paid to Respondent for Petitioners' previous purchases of water. Petitioners' theory of the case was premised entirely on this Court's holding in *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960) (the "1960 Case"). According to Petitioners, the 1960 Case held that Respondent does not own any right, title or interest in the waters of the Grand River. The District Court and the Tenth Circuit Court of Appeals ("Tenth Circuit") rejected this argument, finding that the 1960 Case was merely a "takings case" under the Fifth Amendment to the United States Constitution. The Tenth Circuit also found that the 1960 Case did not decide any property rights issues in the waters of the Grand River.[1]

After losing in federal court, Petitioners sought identical relief against Respondent in the Craig County District Court, State of Oklahoma ("State Trial Court"). Pet. App. 38a-52a. Like the federal action, Petitioners hinged their claims for relief entirely on the 1960 Case. *Id.*, 45a-47a. Respondent subsequently sought and was granted dismissal of Petitioners' state court petition for failure to state a claim upon which relief can be granted. Pet. App. 20a-21a. Respondent argued, and the State Trial Court found in its Order Dismissing Case, that the Act permits Respondent to sell Petitioners water from the Grand River. *Id.*, 21a.

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[1] *Wagoner County Rural Water Dist. No. 2, et al. v. Grand River Dam Auth.*, 577 F.3d 1255, 1259 (10th Cir. 2009); *Wagoner County Rural Water Dist. No. 2, et al. v. Grand River Dam Auth.*, 625 F. Supp. 2d 1162, 1168 (N.D. Okla. 2008). Respondent was ultimately dismissed from the federal district court action on sovereign immunity grounds.

Petitioners then appealed the State Trial Court's order of dismissal to the Oklahoma Supreme Court ("State Supreme Court") under Oklahoma's "fast track" appellate procedure. Under this procedure, an appellant may appeal an order of an Oklahoma state trial court to the State Supreme Court, which either retains the appeal or assigns it to the State Appeals Court. Okla. Sup. Ct. R. 1.36(f). The appellate court decides the issue on the briefs and pleadings filed in the state trial court action. Parties are not required to submit additional briefing to the appellate court unless otherwise ordered. *Id.*, R. 1.36(g).

In the case below, the State Supreme Court assigned Petitioners' appeal to the State Appeals Court, which did not order additional briefing. On May 7, 2010, the State Appeals Court issued the State Court Decision, which upheld the State Trial Court's order of dismissal. Pet. App. 1a-19a. The State Appeals Court determined that under federal law states generally have the superior right to their non-navigable waters. *Id.*, 7a-8a. The court further rejected Petitioners' interpretation of the 1960 Case. *Id.*, 10a-11a. Finally, the State Appeals Court found that the Act and decisions from the State Supreme Court authorize Respondent to sell Petitioners water from the Grand River, which are not preempted by federal law. *Id.*, 5a-8a, 11a-12a, 14a-19a.

After losing in the State Appeals Court, Petitioners sought discretionary review with the State Supreme Court. Pet. App. 53a-69a. In their petition for writ of certiorari to the State Supreme Court, Petitioners took a different tact in their quest for free water. They substantially abandoned their argument that the 1960 Case decided any water rights that *Respondent* had or

claimed in the *Grand River*. *Id.* Instead, Petitioners argued for the first time that *Oklahoma* does not own *any water* within its boundaries, citing various decisions from this Court and the Tenth Circuit in support (the "New Federal Cases").[2] *Id.* On September 20, 2010, the State Supreme Court denied discretionary review without decision. Pet. App. 23a-24a.

As further discussed *infra*, the action in the Oklahoma state courts below concerns an *intrastate* water rights dispute between an Oklahoma state agency and Oklahoma plaintiffs involving a non-navigable stream that is located wholly within Oklahoma. This type of dispute does not present a federal question, either under the United States Constitution, federal common law or any other bases for federal court jurisdiction. Even if Petitioners have presented a proper federal question to this Court under the Commerce Clause, they did not "press" this question to any Oklahoma state court, and no Oklahoma court "passed upon" this question. Pet. App. 38a-52a; App. 1b-36b; Pet. App. 20a-21a; 1a-19a; 53a-69a; 23a-24a. The first time that Petitioners have ever raised a question under the Commerce Clause is in their Petition to this Court. Pet. 8, 13. Finally, the State Appeals Court's decision also rested upon independent and adequate state law grounds. The Act and settled case law from the State Supreme Court

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[2] The New Federal Cases include: *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Douglas v. Seacost Products, Inc.*, 431 U.S. 265 (1977); *United States v. Chandler Dunbar Water Power Co.*, 229 U.S. 53 (1913); and *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008).

have long held that Respondent is expressly authorized to sell water from the Grand River to Petitioners and others. This right fits squarely within Oklahoma's broader right to regulate, control and appropriate water rights within its non-navigable waterways for the public's benefit. These broader rights are consistent with Oklahoma's police power to protect its public water interests and Oklahoma's mutual, complimentary use of its water by public and private interests. Such rights are not in conflict with this Court's holdings as it relates to a state's interest in its internal waters.

REASONS FOR DENYING THE PETITION

I. PETITIONERS HAVE NOT PRESENTED A FEDERAL QUESTION FOR REVIEW UNDER 28 U.S.C. § 1257

Pursuant to 28 U.S.C. § 1257(a), final decisions by the highest state court may be reviewed by certiorari when the validity of a federal treatise or statute, or of a state statute seen as repugnant to federal law, is drawn into question.[3] Any federal issue that the Court reviews must be "substantial." *Zucht v. King*, 260 U.S. 174, 176 (1922); Sup. Ct. R. 10 (referring to "important federal question[s]" or "an important question of federal law"). Merely alleging a federal question does not give rise to jurisdiction; rather, the case must turn on a "real and not merely a formal Federal question." *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308,

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[3] Section 1257(a) jurisdiction also exists when any title, right, privilege or immunity is specially set up or claimed under federal law. Petitioners do not allege this circumstance in their Petition.

311 (1902). Moreover, the Court will not consider questions so lacking in substance that no further argument is required. This includes issues that have already been determined and frivolous claims. *E.g.*, *Hodges v. Snyder*, 261 U.S. 600, 601 (1923); *Hamilton v. Regents of the Univ. of California*, 293 U.S. 245, 258 (1934); *Crumpacker v. Indiana Supreme Court Disciplinary Comm'n*, 470 U.S. 1074, 1074-1075 (1985) (Burger, C.J., concurring).

Petitioners allege that the State Appeals Court's interpretation of the Act and Respondent's water rights in the Grand River are repugnant to the Commerce Clause. Pet. 8, 13. They also appear to allege that a federal question exists for review under federal common law based on the 1960 Case and the New Federal Cases. Pet. 4-6. These are the only two conceivable bases for jurisdiction under Section 1257, and neither present a federal question. Petitioners do not allege that the Act is repugnant to a federal statute, any acts or regulations of a federal administrative agency, admiralty or maritime law, the laws of the District of Columbia or a treatise with another country.

A. There Is No Commerce Clause Issue Present Here

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const., Art. I, § 8, cl. 3. Although the Constitution does not expressly limit the power of states like Oklahoma to regulate commerce, the Court has long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal

statute. *E.g.*, *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citations omitted). In order to determine whether a state law violates "this so-called 'dormant' aspect of the Commerce Clause," the Court uses a two part test. First, the Court asks whether the state law discriminates on its face against interstate commerce. *Id.* (citations omitted). In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* (citations omitted). Discriminatory laws "motivated by 'simple economic protectionism' are subject to a 'virtually *per se* rule of invalidity,' which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose." *Id.* (citations omitted).

If the state law does not discriminate on its face, the Court utilizes the test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), in order to determine if the law offends the Commerce Clause. *United Haulers*, 550 U.S. at 346. This test is reserved for laws "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Id.*, *quoting Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Under the *Pike* test, the Court will uphold a nondiscriminatory statute "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.*, *quoting Pike*, 397 U.S. at 142.

Petitioners have not presented an issue under the dormant Commerce Clause to this Court. The dispute below concerns Petitioners' challenge to Respondent's authority under the Act to sell them water from the

Grand River. The Act does not facially discriminate against out-of-state interests. It is directed solely towards in-state interests. The Act only authorizes Respondent to sell water from the Grand River to parties in the reclamation district, which lies within Oklahoma. Okla. Stat. tit. 82, § 861 (creating the reclamation district and listing the Oklahoma counties that are within the district); *Id.*, § 862(a) (stating, *inter alia*, that Respondent may sell the waters of the Grand River only "within the boundaries of the district"). No entity outside of Oklahoma purchases the water from Respondent or claims an interest in the water at issue. Respondent does not transport the water from the Grand River outside of Oklahoma for sale to non-residents and is not authorized to do so under the Act. *Id.*, § 862 (listing the specific powers, rights and privileges of Respondent in and to the reclamation district, including the waters of the Grand River). There simply is no viable contention that the Act provides differential treatment that benefits in-state economic interests at the expense of out-of-state interests.

Given that Respondent's authority under the Act to sell water is nondiscriminatory and directed towards local concerns, the issue then concerns whether the Act creates an *excessive* burden that is imposed upon *interstate* commerce. There is no such burden imposed here. Every economic activity associated with Respondent's sales of water from the Grand River to Oklahoma residents within the reclamation district as defined in the Act occurs within Oklahoma. It is a

purely *local activity* for legitimate purposes[4] that does not have even an *incidental* effect on interstate commerce.

A party challenging the validity of a state statute under the dormant Commerce Clause has the burden to show that it discriminates against out-of-state interests. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Far short of meeting this burden, Petitioners have not even alleged same as it relates to Respondent's sales of water under the Act. Instead, Petitioners simply allege a constitutional challenge under the Commerce Clause without any support or analysis. But upon closer examination, no such Commerce Clause issue exists here even under the most liberal reading of this Court's dormant Commerce Clause jurisprudence.[5]

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[4] *See* discussion in Part III, *infra*, regarding Oklahoma's rights under its police power to regulate the waters of the Grand River under the Act for beneficial purposes.

[5] There is no Commerce Clause issue here even under the Court's non-dormant Commerce Clause cases involving federal laws or statutes that might be repugnant to the Constitution. *E.g.*, *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (listing three general categories where Congress may use its commerce power). Sales of water from the Grand River under the Act do not implicate any channels or instrumentalities of interstate commerce or activities that substantially affect interstate commerce. *Id.* It is a purely local activity that has no effect on interstate commerce for the reasons explained above.

B. There Is No Federal Common Law Issue Present Here

If federal common law governs a case, the case presents a federal question within the subject matter jurisdiction of federal courts. *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972). However, "the various bailiwicks of federal common law are limited in number." *Woodward Governor Co. v. Curtiss-Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999), *citing O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) ("... cases in which judicial creation of a special federal rule would be justified ... are ... 'few and restricted,'"), *quoting Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

The Court has spoken on several occasions regarding when federal common law applies in a federal lawsuit. *See Atherton v. FDIC*, 519 U.S. 213, 218 (1997); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-07 (1997). The Court has explained that, as a threshold matter, a case must implicate "uniquely federal interests" for federal common law to apply. *Boyle*, 487 U.S. at 504 (internal quotation marks omitted). As Justice Scalia explained in *Boyle*, such interests arise only in a few instances, including: (1) the obligations to, and rights of, the United States under its contracts; (2) the liability of federal officers for official acts; and (3) civil liabilities arising out of federal procurement contracts. *Id.* at 504-06.

Even when "uniquely federal interests" are implicated, federal common law applies only when there is a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87. *See also Boyle*, 487 U.S. at 504. A

"significant conflict" arises when the application of state law would run counter to a federal policy or interest. *See O'Melveny*, 512 U.S. at 87-88. In the absence of a significant conflict, "a mere federal interest in uniformity is insufficient to justify displacing state law in favor of a federal common law rule." *B.F. Goodrich v. Betkoski*, 112 F.3d 88, 90 (2d Cir. 1997) (per curiam), *cert. denied sub nom. Zollo Drum Co., Inc. v. B.F. Goodrich Co.*, 118 S. Ct. 2318 (1998); *see O'Melveny*, 512 U.S. at 88. Finally, an actual, significant conflict between a federal interest and state law must be "specifically shown," and not generally alleged. *Atherton*, 519 U.S. at 218; *O'Melveny*, 512 U.S. at 87-88.

The case below does not present an issue of federal common law. There are no "uniquely federal interests" present or a "significant conflict between some federal policy or interest" implicated by the dispute below. As discussed *supra*, Respondent's sales of water to Oklahoma residents within the reclamation district is a purely local activity that has no effect on interstate commerce. Moreover, the United States is not a party to the lawsuit below and does not claim an interest adverse to Respondent in the water that is sold to Petitioners. The United States has never objected to Respondent's sales of water from the Grand River under the Act in any court or proceeding. There is no issue involving civil liability arising out of the performance of a federal procurement contract. The facts and legal issues here do not fall within any of the instances of federal common law identified in *Boyle*. It is hard to imagine a federal common law issue under these facts. There is no persuasive reason for expanding the narrow scope of federal common law to a dispute involving intrastate parties, activities and

property that does not encompass a federal interest or involve the federal government.

C. Petitioners' Reliance Upon The 1960 Case And The New Federal Cases Does Not Create A Federal Question Because They Are Inapposite

Petitioners suggest that they raised a "federal question" in citing to the 1960 Case, which they contend decided Respondent's water rights in the Grand River. Pet. 4-6. Petitioners also suggest that they presented a "federal question" in framing the issue before the State Appeals Court as whether Oklahoma "owned" any of its waters, including the Grand River. *Id.* Petitioners claim that the State Appeals Court wrongly decided this issue when considering the New Federal Cases. Pet. 11-12. Petitioners' belated attempt to create federal question jurisdiction on these grounds is without merit. Petitioners have grossly misconstrued the holding in the 1960 Case, and the New Federal Cases are inapposite to the facts and legal issues present here. None support Petitioners theory of "state ownership" of Oklahoma's waters.

The 1960 Case was a "takings" case under the Fifth Amendment involving competing interests between the United States and Respondent to the non-navigable flow of the Grand River for the sole purpose of *developing hydroelectric power projects*. The United States had condemned land that Respondent owned to build its own hydroelectric project at Ft. Gibson on the Grand River, for which it paid Respondent compensation. 363 U.S. at 230. Respondent claimed more compensation was due for the additional "taking"

of its *water power rights* at Ft. Gibson and its franchise to develop electric power and energy at that site. *Id.* The Court held that Respondent was not entitled to additional compensation from the Untied States under the Fifth Amendment, because under the Commerce Clause the United States had the superior right to develop the hydroelectric project at Ft. Gibson or license another to do it. 363 U.S. at 236.

The 1960 Case did *not* decide Respondent's property rights in the waters of the Grand River itself as Petitioners contend. The Court was clear on this point:

> The Government contends that the navigational servitude of the United States extends also to nonnavigable waters [of the Grand River], pre-empting state-created property rights in such waters, at least when asserted against the Government. In the view we take in this case, however, it is not necessary that we reach that contention.

Id. at 232. The Tenth Circuit, which is the only federal appellate court to have considered Petitioners' position on this issue, is in accord with the Court's statement above:

> In addition, and contrary to the plaintiffs' assertion, the takings case did not determine the extent (if any) of GRDA's ownership interest in the Grand River water itself. Rather, the sole issue was whether the United States owed any additional compensation to GRDA for taking GRDA's purported interests in water

> power and developing electric power and energy at Fort Gibson Dam.

577 F.3d at 1259. *See also Grand River Dam Authority*, 625 F. Supp. 2d at 1168 ("The 1960 Case ... resolved only one issue: whether the United States had committed a 'taking' under the Fifth Amendment."). The State Appeals Court, which is the only state appellate court to have considered Petitioners' argument concerning the holding of the 1960 Case, is also in accord:

> This case does not hold, as the Water Districts argue, that the GRDA failed to prove that it had any right to the water in the Fort Gibson reservoir. In fact, the Supreme Court specifically refused to reach the issue argued by the United States: the federal government's right to navigable water preempts state created property rights to non-navigable water. The case merely holds that the right of the GRDA to produce electricity from the Fort Gibson reservoir was inferior to the right of the federal government to do so.

Wagoner County Rural Water Dist. No. 2. v. Grand River Dam Auth., 241 P.3d 1132, 1136 (Okla. Civ. App. 2010). *See also* Pet. App. 10a-11a.

The 1960 Case cannot be used to manufacture federal question jurisdiction because it did not decide any competing claims of ownership in the waters of the Grand River. There simply is no "uniquely federal interest" created by this case. This is particularly true given that the United States, as noted, is not a party to the case below, does not assert an interest adverse

to Respondent relative to its rights to sell water of the Grand River and has never challenged Respondent's authority under the Act to appropriate water from the Grand River for beneficial purposes. It is also true given that the 1960 Case is a takings case, Petitioners were not a party to that case and they do not claim an interest in the waters of the Grand River.

The New Federal Cases upon which Petitioners rely similarly do not create federal question jurisdiction. Petitioners contend these cases support the notion that Oklahoma has no interest in its waters until the water has "been reduced to possession ... through physical capture and control." Pet. 13. These cases are inapposite because they, unlike this case, actually implicate interstate commerce. In *Sporhase v Nebraska*, the plaintiff challenged a state's right to restrict the sale of groundwater to out-of-state residents. In *Hughes v. Oklahoma*, the plaintiff challenged an Oklahoma statute that forbid a person from transporting or shipping minnows for sale outside of the state that were seized or procured from waters within the state.[6] These cases each found that water

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[6] *See Sporhase v. Nebraska*, 458 U.S. 941 (1982); *Hughes v. Oklahoma*, 441 U.S. 322 (1979). *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), involved whether a Virginia statute could prohibit federally licensed vessels owned by non-residents from fishing in Virginia waters. This was held to violate the Supremacy Clause, and thus, a competing federal interest in water. *Id.* at 286-87. The Court decided the water rights issue in that context, which is not present in this case. *United States v. Chandler Dunbar Water Power Co.*, 229 U.S. 53 (1913), involved a condemnation proceeding instituted by the United States under a federal statute concerning navigable waters located in Michigan. That case, unlike this one, also involved a competing federal interest to water. None of the cases relied upon by Petitioners

or wildlife were articles of commerce, not articles of state ownership. Perhaps "ownership" of property is relevant when adjudicating particular *interstate* water or property rights disputes under the Commerce Clause, which implicates a paramount federal interest. But it is clearly not relevant in adjudicating disputes between *intrastate* parties, activities and property located wholly within the state's borders, which does not implicate the Commerce Clause or any federal or interstate interests.

Petitioners' reliance upon *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008) also does not help them. That case involved a challenge under the dormant Commerce and Supremacy Clauses to an Oklahoma statute that prevented a Texas water district from appropriating or purchasing surface water located in Oklahoma. *Id.* at 909-10. Like *Sporhase* and *Hughes*, but unlike this case, *Tarrant* involved a property dispute between interstate parties. Moreover, the case did not even decide the interstate property rights dispute. It held merely that the case was ripe for appeal, that the Oklahoma state agency at issue was not protected by Eleventh Amendment immunity, and that the court did not have jurisdiction to consider defendants' appeal of the district court's refusal to abstain under the *Younger* doctrine. *Id.* at 915. The facts and holdings in *Tarrant* are clearly distinguishable from the dispute and issues here. Finally, *Tarrant* did not hold, as Petitioners contend, that "Oklahoma does not enjoy an 'ownership interest'

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involve intrastate parties, activities and rights to internal waters located within a state.

in water resources located in the state."[7] This was not the issue before the court. Pet. 11; *Id.* at 913. This statement at best is *dicta*, as it was made in the context of whether the Oklahoma state agency had a cognizable Eleventh Amendment immunity defense, which is not at issue in this case.

Indeed, Petitioners have undoubtedly painted much too broad of a brush in their interpretation of the New Federal Cases even if they presented analogous facts. If, as Petitioners contend, this Court and the Tenth Circuit in *Tarrant* actually held that a state has *no property ownership interest in its water resources whatsoever*, this Court and the *Tarrant* court would have contradicted their prior jurisprudence, including in particular settled precedent involving the equal footings doctrine. This doctrine posits that the original Thirteen Colonies, as sovereign entities, owned the

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[7] The *Tarrant* court cited to *Sporhase* for this proposition. *Id.* at 913. However, the Court in *Sporhase* also recognized that even if water is an article of commerce, "the existence of unexercised regulatory power does not foreclose state regulation of its water resources, [or] of the uses of water within the State, or indeed, of interstate commerce in water." 458 U.S. at 954 (citations omitted). This statement diminishes any statement in *Tarrant* regarding Oklahoma's water rights in its internal waters particularly when, as here, there is no competing or paramount federal interest or interstate property dispute. This statement also supports the notion that Respondent may sell water to Petitioners under the Act as part of its regulatory function as long as doing so does not infringe on a paramount federal interest. *See e.g., Day v. Armstrong*, 362 P.2d 137, 143 (Wyo. 1961) ("However, except when so used or available for use in interstate or international commerce, the exclusive control of waters is vested in the state, whether the waters are deemed navigable in the Federal sense or in any other sense."), *citing, inter alia, Donnelly v. United States*, 228 U.S. 243 (1913).

absolute right to all of their navigable waters.[8] When subsequent states like Oklahoma entered the Union, they did so on an equal footing with the original Thirteen Colonies and similarly retained ownership over their sovereign lands and waters. Hence, if what Petitioners say in their Petition is true then the equal footings doctrine would be turned on its head. Of course this is not true, as the equal footings doctrine has been recognized as settled law since the time of the Founding Fathers.

D. This Court's Water Rights Cases Support Respondent's Statutory Function And Rights In The Grand River Under The Act

Prior decisions from this Court belie the notion that Oklahoma does not have an interest in any of its water resources and is precluded under the Act from managing, appropriating and selling such water to others for beneficial purposes. These decisions demonstrate that a state's property interest and rights in water located within its borders has long been settled and is not in controversy. The State Appeals Court did not wrongly decide the dispute below based upon its determination of Respondent's interest in the waters of the Grand River.

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[8] *E.g.*, *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 283-84 (1997). The Tenth Circuit discussed and applied the equal footings doctrine in *Koch v. U.S. Dep't of Interior*, 47 F.3d 1015, 1018-19 (10th Cir. 1995). It is inconceivable that the Tenth Circuit in *Tarrant* held that a state owns *no* interest in water, because under the equal footings doctrine states clearly do have such ownership interests.

In *California v. United States*, the Court stated that "as to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise." 438 U.S. 645, 662 (1978), *quoting United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). The Court also stated that "there are two limitations to the State's exclusive control of its streams - reserved rights 'so far as may be necessary for the beneficial uses of the government property' ... and the navigational servitude." *Id.* Finally, the Court stated that "except where the reserved rights or navigational servitude of the United States are invoked, the State has total authority over its internal waters." *Id.* In *Nevada v. United States*, the Court stated that, at least as it relates to states subject to the Desert Land Act of 1877, "[a]cquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states." 463 U.S. 110, 123-24 (1983) (citations omitted). In *Kansas v. Colorado*, the Court stated that "[e]ach State has full jurisdiction over the lands within its borders, including the beds of streams and other waters." 206 U.S. 46, 93 (1907) (citations omitted). And in *United States v. Cress*, the Court stated that:

> The states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks ... , subject however, in the case of navigable streams, to the paramount authority of Congress to control

> the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations ..., the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation.

243 U.S. 316, 320-21 (1917) (citations omitted). *See also Fox River Paper Co. v. Railroad Com'n of Wisconsin*, 274 U.S. 651, 655 (1927) ("Although presumptively title to the soil under navigable waters within the state is in the state ... , the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state.") (citations omitted); *North Shore Boom Co. v. Nicomen Boom Co.*, 212 U.S. 406, 412 (1909) ("The river in question is a navigable stream, entirely within the state of Washington, and, in the absence of any statute by Congress, a state has plenary power in regard to such waters.").[9]

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[9] Petitioners' argument concerning Oklahoma's interest in its intrastate waters also contradicts hornbook water rights law. *See* 78 Am. Jur. 2d *Waters* § 138 (2002) ("As a general rule ... each state has the power to regulate and control the navigable or public waters within its own boundaries. As to waters which lie wholly within a state, and which do not constitute a part of the navigable waters of the United States, the authority of the state is complete and exclusive....") (citations omitted); 94 C.J.S. *Waters* § 345 (2001) (stating, *inter alia*, that "[a] state owns the underlying fee to all of the water in a state and thereby may retain substantial regulatory power over water rights" for the general welfare subject to any paramount federal interests) (citations omitted).

Petitioners' attempts to manufacture a federal question under the Commerce Clause and federal common law fail. None of the cases that Petitioners cite suggest otherwise. Unlike this case, Petitioners' cases involve competing federal interests and interstate disputes and property rights issues. Petitioners do not cite to a single case holding that a dispute involving intrastate parties, activities and property presents a federal question.[10] Respondent is not aware of any such cases. As the cases above demonstrate, the Court has long held that so long as no paramount federal interests are involved, a state's interest in its internal waters is plenary and absolute.

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[10] Petitioners question the State Appeals Court's reliance upon *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). Pet. 7. The State Appeals Court cited *Hudson* for the proposition that states generally own the superior right to their non-navigable water. Pet. App. 7a; 209 U.S. at 356. Petitioners claim that the court's reliance upon *Hudson* is erroneous, because *Hudson* relied upon *Geer v. Connecticut*, 151 U.S. 519 (1896), which this Court overruled in *Hughes v. Oklahoma* along with the notion of "state ownership" of wild animals. 441 U.S. at 325. It is important to remember that the "state ownership" question in *Hughes* and later *Sporhase*, upon which Petitioners base most of their legal argument herein regarding Respondent's rights under the Act, was decided in the context of a dispute under the Commerce Clause and interstate commerce. *Hudson*'s citation to *Geer* occurred in the context of a Commerce Clause issue. *Sporhase*, 458 U.S. at 947; 209 U.S. at 357. This issue, as discussed, is not present here. The proposition in *Hudson* relied upon by the State Court Appeals court occurred in relation to the just compensation claim, which constituted most of the opinion and did not depend upon *Geer*. *Id.* at 946; 209 U.S. at 356. *Hudson* is also consistent with this Court's water rights cases cited herein. A state has an interest in and control over its intrastate waters subject to any paramount federal interest that may exist, which in this case does not exist.

Petitioners cannot present a federal question for review herein under Section 1257(a).

II. PETITIONERS' CONSTITUTIONAL CHALLENGE TO THE ACT WAS NOT "PRESSED OR PASSED UPON BELOW"

Even if Petitioners presented a proper challenge under the Commerce Clause for review in this Court, they failed to press that challenge in the state courts below, and those courts failed to pass upon this issue. Jurisdiction to hear Petitioners' appeal in this Court fails for this reason.

In *Yee v. Escondido*, 503 U.S. 519 (1992), the Court reiterated that in reviewing the judgments of state courts under 28 U.S.C. § 1257, "the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below." *Id.* at 533, *citing Illinois v. Gates*, 462 U.S. 213 (1983). The policy behind the Court's "not pressed or passed upon below" rule is premised on comity to the states and the need for a properly developed record on appeal. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). As stated in *Cardinale v. Louisiana*, 394 U.S. 437 (1969):

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first

> opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, ... they should be given the first opportunity to consider them.

Id. at 439 (citation omitted). *See also Webb v. Webb*, 451 U.S. 493, 499 (1981) (stating the same).

The Court has stated that when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party can affirmatively show otherwise. *E.g., Street v. New York*, 394 U.S. 576, 582 (1969); *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). *See also Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308 (1903) (stating that a petitioner desiring to show that a claim was raised may rely upon a "pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court"). The Court will look to local law to determine when federal questions should be timely raised. Regardless of whether local, general, or federal rights are in dispute, each state "prescribe[s] the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its courts." *John v. Paullin*, 231 U.S. 583, 585 (1913) ("Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, ...").

Under Oklahoma law, "[w]here parties seeking to question the constitutionality of a statute and fail specifically to point out the unconstitutionality, and cite no authority in support thereof, this court is not required to review such question." *In re Conservancy Dist. No. 37*, 398 P.2d 525, 530 (Okla. 1965) (citation omitted). Similarly, "[t]he general rule in Oklahoma concerning appeals from the District Court is that the Supreme Court will confine its appellate review to issues which were presented below." *McKinney v. Harrington*, 855 P.2d 602, 604 (Okla. 1993) (citations omitted). *See also In re Askins Prop.*, 161 P.3d 303, 309 (Okla. 2007) ("[A] question of law presented and argued on appeal that is not shown to arise under the facts and record will not be considered and determined.") (quotation omitted).

Petitioners did not plead a constitutional claim in their petition below or even allege that the Act was unconstitutional therein. Pet. App. 38a-52a. They did not raise or suggest a challenge to the Act under the Constitution in their opposition to Respondent's motion to dismiss in the State Trial Court. App. 1b-36b. Not surprisingly, the State Appeals Court did not address or refer to a constitutional question or challenge to the Act in its written opinion.[11] Petitioners similarly did not press a constitutional challenge in their petition for discretionary review with the State Supreme Court, which denied the petition without decision. Pet. App. 53a-69a, 23a-24a.

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[11] This perhaps explains why the State Appeals Court framed the issue on appeal as follows: "The dispositive issue in this appeal requires a determination of the ownership of the water sold by the GRDA to the Water Districts." Pet. App. 4a.

On these facts Petitioners clearly failed to make a proper presentation of their constitutional challenge in this Court under the Commerce Clause to the Oklahoma state courts below. They never gave Oklahoma's highest court a chance to assess the constitutionality of the Act or the decision of the State Appeals Court under the Commerce Clause before raising this issue for the first time in this Court. The *Yee* case is instructive:

> The Yees did not include a due process claim in their complaint. Nor did petitioners raise a due process claim in the Court of Appeal. It was not until their petition for review in the California Supreme Court that petitioners finally raised a substantive due process claim. But the California Supreme Court denied discretionary review. Such a denial, as in this Court, expresses no view as to the merits. ... In short, petitioners did not raise a substantive due process claim in the state courts, and no state court has addressed such a claim.

503 U.S. at 533. Another analogous case is *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987). There, appellants argued that the Unruh Act was unconstitutionally vague and overbroad. The first time that appellants raised this issue, however, was when they filed a petition for rehearing with the California Court of Appeal, which denied the petition without opinion. As in *Yee*, the Court found that it lacked jurisdiction because the appellants did not adequately present their constitutional challenge in the state system. *Id.* at 549-50 (citations omitted).

The facts of this case are worse for Petitioners than those found in *Yee* and *Rotary Club*. Like these cases, Petitioners were required under state procedural law to raise their constitutional challenge in the state district and appeals court in order to obtain review from the state's highest court. But unlike *Yee* and *Rotary Club*, Petitioners here failed even to raise a constitutional claim or issue in their petition for discretionary review to Oklahoma's highest court. Indeed, they never raised any constitutional challenge to the Act or otherwise until filing their Petition with this Court.[12] And even if Petitioners did somehow alert Oklahoma's highest court to a constitutional challenge, that court's failure to pass upon the issue in denying discretionary review is presumed to have occurred due to a want of proper presentation in Oklahoma's lower courts, which was required under

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[12] The word "unconstitutional" does not appear in *any* paper that Petitioners submitted to the lower state courts in conjunction with their argument that Respondent or Oklahoma does not "own" its waters. This includes Petitioners' state court petition, App. 38a-52a, their brief in opposition to Respondent's motion to dismiss in the State Trial Court, App. 1b-36b, and their petition for discretionary review to the State Supreme Court, Pet. App. 53a-69a. This Court has upheld the "pressed or passed upon below" rule under less onerous circumstances. *See, e.g., Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) (general or vague references will not preserve federal issues); *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) (reference to Fourteenth Amendment does not preserve claim based on unidentified Bill of Rights provision); *Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935) (statement that federal constitution was violated insufficient); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68 (1928) (reference to "unconstitutional" alone would not provide a basis for Court review).

Oklahoma procedural law and which clearly did not occur.[13]

Under no stretch of the imagination can Petitioners contend that their constitutional challenge under the Commerce Clause herein was either "pressed or passed upon" below.

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[13] In Oklahoma "where two actions between the same parties involving the same cause of action proceed at the same time in courts of concurrent jurisdiction . . . the first final judgment . . . renders the issues *res judicata* in both actions." *Brink v. Bartlett*, 294 P. 106 (Okla. 1930) (Syllabus). In *Brink* the State Supreme Court applied this principle to dismiss an appeal from an Oklahoma trial court, holding that a prior Tenth Circuit decision concerning the same parties and legal identity of the subject matter was *res judicata* as to the case on appeal before the court. *Id.* at 107. As earlier discussed, Petitioners sued Respondent for identical relief in federal court before initiating their state court lawsuit. *See* Statement of the Case, *supra*. At issue in both cases was Respondent's right to sell Petitioners water from the Grand River and whether same was permissible under the 1960 Case. *Id.* The Tenth Circuit decided the interpretation of 1960 Case against Petitioners on August 24, 2009, before the State Appeals Court entered the State Court Decision on May 7, 2010. *See* Note 1, *supra*. Petitioners then changed their argument to include the New Federal Cases in their request for discretionary review to the State Supreme Court. Pet. App. 53a-69a. The State Supreme Court likely would have dismissed Petitioners' appeal related to the 1960 Case on *res judicata* grounds. The State Supreme Court likewise would not have considered the New Federal Cases, as Petitioners failed to raise them in the petition and briefing in the State Trial Court. Pet. App. 38a-52a; App. 1b-36b. *McKinney v. Harrington;* 855 P.2d at 604; *In re Askins Prop.*, 161 P.3d at 309.

III. THE STATE COURT DECISION RESTED UPON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS

As urged *supra*, Petitioners have failed to present a federal question for review. But even if they did, and even if the State Appeals Court's resolution of such federal question was erroneous as Petitioners contend, the State Court Decision rested upon independent and adequate state law grounds.

This Court will not review a question of federal law presented in a state court case "if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (emphasis added). This limitation on the Court's jurisdiction stems from the division of power between the state and federal courts and a desire to avoid "advisory opinions." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."). The Court has held that it has no power to review state determinations of purely state law or to review federal issues that can have no effect on the state court's judgment. *E.g., Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986). Therefore, the Court has held that it will not review a decision resting on adequate and independent state grounds even if the state court has presented an erroneous view of the federal law that was presented. *E.g., Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945).

The Act established Respondent as a non-incorporated agency of the State of Oklahoma,

according it the power of government and the authority to exercise rights, including the control, storing, preservation, reclamation and distribution of the waters of the Grand River and its tributaries, for irrigation, power and other useful purposes. Okla. Stat. tit. 82, § 861. The Act also expressly authorizes Respondent to sell water from the Grand River to parties like Petitioners:

> The district shall have and is hereby authorized to exercise the following powers, rights and privileges:
>
> (a) To control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district...

Okla. Stat. tit. 82, § 862(a). The Act further prescribes Oklahoma's interest in the waters of the Grand River, which it authorizes Respondent to sell on its behalf:

> That the waters of Grand River in Oklahoma and the Pensacola and Markham Ferry Reservoirs, located thereon, be and are hereby determined and declared to be non-navigable and waters of the State of Oklahoma.

Id., § 887. In *Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*, the State Supreme Court recognized Oklahoma's broad right to control and appropriate its non-navigable, public waters for beneficial purposes.

> The state is without authority to transfer one man's property to another, but its power to control unappropriated public waters is plenary. Definite nonnavigable streams are public waters. The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes.

464 P.2d 748, 753 (Okla. 1968). In *Grand-Hydro v. Grand River Dam Authority*, the State Supreme Court further recognized Oklahoma's specific right to control and appropriate the waters of the Grand River under the Act, which it delegated to Respondent:

> The statute, *supra*, creating the Grand River Dam Authority and defining its functions purports to be an express appropriation by the State of the waters in Grand River to be applied to the uses therein stated, and to place in its said agency exclusive authority to develop the stream in the manner therein provided. The State may control the flow of all nonnavigable streams such as the Grand River. And it may reserve to itself or grant to private parties the right to utilize such streams for power and other purposes.

139 P.2d 798, 801 (Okla. 1943). Finally, the State Supreme Court found that Oklahoma's right to appropriate and control its water interests through the Legislature is consistent with its paramount police power and is *without consideration of private ownership interests*: "The Legislature may exercise its police power to protect the state's water irrespective of the rights of private owners of the land most

immediately concerned." *Jacobs Ranch, LLC v. Smith*, 148 P.3d 842, 849-50 (Okla. 2006).

The State Appeals Court relied upon the foregoing Oklahoma cases and statutes throughout its decision upholding the State Trial Court's dismissal of Petitioners' state court petition. Although the State Appeals Court addressed federal issues in its decision, the State Appeals Court could have ignored such issues and supported its decision solely under the state law authorities discussed above. These Oklahoma authorities demonstrate that Respondent is authorized to sell water from the Grand River to Petitioners and others. This right fits squarely within Oklahoma's broader right to regulate, control and appropriate water rights within its internal waterways for the public's benefit. These broader rights are consistent with Oklahoma's well-recognized police power to protect its public water interests and Oklahoma's mutual, complimentary use of its water by public and private interests. *See, e.g., Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, 855 P.2d 568, 575-77 (Okla. 1990); *see also Jacobs Ranch*, 148 P.3d at 849 ("It is a basic principle that water is a natural resource, ... , which the state may regulate for the health, welfare and safety of the people."), *citing Wyoming v. Colorado*, 259 U.S. 419 (1922), *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Natural Resources*, 504 U.S. 353, 365 n.6 (1992).

Significantly, Oklahoma's exercise of its police power under the Act does not implicate the Commerce Clause or a paramount federal interest, and its right to sell Petitioners water from the Grand River to state residents for beneficial purposes is not in conflict with this Court's water rights cases discussed above.

Likewise, resolution of the federal issues addressed by the State Appeals Court, including Oklahoma's rights to its internal water, is not in conflict with these cases. Unless a superior federal interest is involved, a state may appropriate, control, store, manage, preserve and sell water within its borders to its residents for beneficial purposes. It is clear that the State Court Decision rests upon independent and adequate state law grounds apart from any federal issues that the State Appeals Court addressed.[14]

A persuasive case is *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). This case involved a dispute between the State of Oregon and an Oregon corporation over the ownership of two portions of land underlying the Willamette River, which is navigable but not an interstate boundary. The Court held that the disputed ownership of the riverbed lands should be decided solely as a matter of Oregon law and not federal common law, given that application of

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[14] The authorities discussed *supra* demonstrate that legal "ownership" of the waters of the Grand River is not the *sine qua non* of Respondent's right to control, regulate and appropriate waters from the Grand River under its police power for beneficial purposes, which includes selling the water to others. None of these authorities require that Respondent "own" the water as a prerequisite to its right to perform its statutory functions under the Act. Petitioners do not cite to a single case standing for the proposition that before a state may exercise its police power to regulate and control its internal waters for beneficial purposes that it must first have legal "ownership" of such waters. This is not surprising given that such a case would contradict these authorities, including this Court's water rights cases cited herein, which generally posit that states may decide for themselves the rules of property ownership in their internal waters subject to any paramount federal interest.

same is required neither under the equal footings doctrine nor by any other principle of federal law. *Id.* at 381 ("We also think there was no other basis in that case, nor is there any in this case, to support the application of federal common law to override state real property law.").

Petitioners are asking this Court to ignore its prior jurisprudence, to apply federal cases that are inapposite to the parties' dispute below and to override extant state law concerning Oklahoma's rights in the water at issue that has been on the books since 1935. Petitioners, whom have paid for the water at issue without complaint for decades, should have first pressed a constitutional challenge to the Act in an Oklahoma state court before seeking this relief in this Court. Absent that, Petitioners should express their displeasure with the Act to the Oklahoma Legislature rather than through a dubious challenge to the Act in this Court that five previous state and federal courts have found is wholly without merit.

CONCLUSION

Petitioners have not presented a federal question for review in this Court under Supreme Court Rule 10 or otherwise. They denied Oklahoma's highest court the opportunity to pass upon the constitutionality of the state law that they complain of herein. That law rests upon independent and adequate state law grounds the resolution of which does not depend upon the resolution of a federal question, since relevant Oklahoma state law is not in conflict with federal law. Put simply, Petitioners have not articulated a compelling reason to grant the Petition.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE DISTRICT COURT
IN AND FOR CRAIG COUNTY
STATE OF OKLAHOMA

Case No. CJ-08-43

Jury Trial Demanded

[Dated July 31, 2008]

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, WAGONER COUNTY RURAL WATER DISTRICT NO. 7, WAGONER COUNTY RURAL WATER DISTRICT NO. 9, CHEROKEE COUNTY RURAL WATER DISTRICT NO. 11, PEGGS WATER COMPANY, and TRI-B NURSERY, INC.	)
Plaintiffs,	)
vs.	)
GRAND RIVER DAM AUTHORITY	)
Defendant.	)

PLAINTIFFS' RESPONSE AND OBJECTION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED PETITION AND BRIEF IN SUPPORT

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PLAINTIFFS' RESPONSE AND OBJECTION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED PETITION AND BRIEF IN SUPPORT

Plaintiffs, Wagoner County Rural Water District No. 2 ("Wagoner 2"), Wagoner County Rural Water District No. 7 ("Wagoner 7"), Wagoner County Rural Water District No .9 ("Wagoner 9"), Cherokee County Rural Water District No. 11 ("Cherokee 11"), Peggs Water Company ("Peggs"), and Tri-B Nursery, Inc. ("Tri-B"), hereby submit their response and objection to the Motion to Dismiss filed by the Defendant, Grand River Dam Authority ("GRDA"). For the reasons that follow, GRDA's Motion should be denied.

I. INTRODUCTION

GRDA was created by the Oklahoma Legislature in 1935 pursuant to 82 O.S. § 861, *et seq.* which conferred on GRDA the right "[t]o control, store and preserve, within the boundaries of the District, the water of the Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District" and "to develop and generate water power and electric energy within the boundaries of the District." (82 O.S. § 862).

After its creation, GRDA surveyed the Grand River and adopted a plan for the creation of three dams along the Grand River at Pensacola, Markham Ferry and Fort Gibson. *Grand River Dam Authority v. U.S.*, 175 F.Supp. 153, 155 (CT.CL. 1959). By 1940, GRDA had constructed the Pensacola dam and had acquired lands, easements and rights of way and had constructed transmission lines, substations and other

facilities for the connection of the Pensacola project with the dams contemplated at Markham Ferry and Fort Gibson. *Id.* However, before GRDA could build the Fort Gibson Dam, Congress passed the Flood Control Act of 1941 which authorized the construction of three dams along the Grand River by the United States. *Id.* The United States undertook the construction of the Fort Gibson dam on its own and completed its construction in 1950. *Id.*

GRDA owns and operates the Pensacola Dam on Grand Lake and the Markham Ferry Dam on Lake Hudson. The United States acting through its agent, the U.S. Army Corps of Engineers owns the land underlying the Fort Gibson Reservoir and it owns and operates the Fort Gibson Dam. The Fort Gibson Reservoir extends from the Fort Gibson Dam on the South to a point on the North side of the reservoir that is less than a mile from the Markham Ferry Dam. (See Exhibit 5 hereto).

The Plaintiffs consist of four Oklahoma rural water districts, a private water company and a private nursery company. The majority of the Plaintiffs appropriate water directly from the Fort Gibson Reservoir or from creeks and steams that feed directly into the Fort Gibson Reservoir. Plaintiff, Peggs Water Company, appropriates water from a well on its own land. However, none of the Plaintiffs appropriate water from any point above where the Grand River becomes the Fort Gibson Reservoir or from creeks or streams that feed directly into the Grand River.

II. PLAINTIFF'S FIRST AMENDED PETITION STATES A CLAIM FOR RELIEF

GRDA contends that Plaintiffs' First Amended Petition fails to state a claim for relief because Plaintiffs can prove no set of facts which entitle Plaintiffs to relief. The basis for GRDA's argument is based on the incorrect assertion that "Plaintiffs' entire lawsuit against GRDA, irrespective of how they style their claims, is premised on a tortured misinterpretation of the 1960 Case..." GRDA is not only incorrect that the Plaintiffs' entire lawsuit is based on the 1960 Case, but it is GRDA that misinterprets the 1960 Case. Plaintiffs are entitled to the relief requested in their First Amended Complaint not only because of the holding of 1960 Case but also because of Oklahoma Law which limits the jurisdictional control of GRDA.

A. NEITHER THE STATE NOR GRDA OWN ANY INTEREST IN THE WATER OF THE GRAND RIVER

While GRDA contends that Plaintiffs' case is based on a "tortured misinterpretation" of the case of *United States v. Grand River Dam Authority,* 363 U.S. 229 (U.S. 1960) (the "1960 Case"), it is GRDA that has misinterpreted the holding in that case. Having aggressively argued to the Supreme Court that GRDA owned a "vested property right" in the waters of the Grand River, GRDA now seeks to downplay the effect of the Supreme Court's ruling arguing that the "Supreme Court did not decide any property rights issues involving the waters of the Grand River." (emphasis added). (GRDA's Motion at p. 4). GRDA conveniently ignores the basis for the holding of the

Court of Claims and its own arguments to the Supreme Court regarding its ownership interest in the water of the Grand River. GRDA also completely misconstrues the Supreme Court's holding.

i. GRDA's Previous Claim To Ownership Of The Water Of The Grand River

After the completion of the Fort Gibson Dam by the United States, GRDA sued the United States in the federal Court of Claims for the taking of its property asserting that it was entitled to compensation for the taking of (1) its water power rights at the Fort Gibson unit, (2) its exclusive franchise to develop electric energy at the Fort Gibson unit, and (3) certain items of severance damages. *Id.* The Court of Claims found the United States had the power to build the Fort Gibson Dam stating:

> The right of a state to control and utilize the water of a non-navigable stream within its boundaries is subordinate to the right of the United States to control such waters to the fullest extent necessary to improve or regulate navigation on a navigable river to which the non-navigable stream is a tributary. There is no question as to the power of the Federal Government to do what it has done here.

Id. at 155-156.

After finding that the United States had the authority to build the Fort Gibson Dam, the Court of Claims focused its attention on whether the United States must pay just compensation to GRDA for any property that it had taken in carrying out the Fort

Gibson project. *Id.* at 156. The Court noted that under the Commerce Clause, the United States had the authority to improve and regulate navigable waters and may take property rights to these waters without compensation. *Id.* However, the Court also noted that if, during the use of this power, private property was taken on a non-navigable stream which is a tributary of the navigable stream, the United States must pay just compensation for the property taken. *Id.* The Court then determined that the exact question before it was whether GRDA had "property rights" in the Grand River which were taken by the United States. *Id.*

The Court of Claims found that GRDA had "vested water rights" in the Grand River and that such rights were property rights that, if taken by the United States, must be paid for.[1] *Id.* at 156. The lynchpin of the Court's decision regarding GRDA's water rights was the finding by the Court that "[t]he State of Oklahoma owns the waters of the Grand River, a non-navigable stream, and the State conferred on [GRDA] all the rights which it possessed in the stream." *Id.* at 156.

The United States appealed the decision to the Supreme Court. On appeal, the United States argued that the decision of the Court of Claims as to GRDA's "vested water rights" was in error because GRDA failed to sustain its burden of proving ownership by the State of Oklahoma of all of the water flowing in the

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[1] The Court of Claims also found that the United States had taken GRDA's franchise to develop electric power and energy at the Fort Gibson Site, but denied GRDA's claim for severance damages. *Id.*

Grand River. (Exhibit 1 hereto, Brief of the United States at p. p. 8, 15-19). Throughout its brief in response, GRDA consistently maintained that it had "vested water rights" in the waters of the Grand River.

> At the time of the taking by [the United States], [GRDA], by legislative grant from the State of Oklahoma, was vested with the absolute right to use and control all of the water power rights in the Grand River, a non-navigable stream. . .

(Exhibit 2 hereto, Brief of GRDA at p. 5).

> The State of Oklahoma had the power and authority to appropriate to and vest in [GRDA] all of the water power rights in the Grand River, together with the exclusive franchise and right to develop the same.

Id.

> **All rights to the waters of the Grand River** had been "**appropriated to and vested in the Grand River Dam Authority**" and others by the State of Oklahoma. . . (emphasis added).

Id.

> The **vested water rights of [GRDA] in the Grand River** are private property and these property rights cannot be taken without payment of just compensation. (Internal citations omitted) (emphasis added).

Id.

> In consequence, **there can be no doubt that [GRDA] had vested water rights in the Grand River** at the time the United States built the Fort Gibson Dam, and that the construction of that Dam took or destroyed the private property of [GRDA], thus entitling it to just compensation. (emphasis added).

Id. at p. 9-10

Not only did GRDA continually argue that it had vested water rights in the Grand River, but it also recognized that in order to prevail in the Supreme Court on appeal, it must prove State ownership of the water in the Grand River. Specifically, GRDA argued:

> [The United States] does not challenge the fact that the State of Oklahoma granted to [GRDA] the use and control of the waters in the Grand River. [The United States] instead appears to contend that the State of Oklahoma did not have an interest in the waters of the Grand River, and accordingly could not give any interest in these waters to [GRDA].
>
> **So certain is [the United States] that [GRDA] cannot show State ownership of the waters used by the Fort Gibson dam, that it has flung down the gauntlet.** "The critical element", [the United States] contends, "is the federal character of the property within the State before it became a state. It is on the basis of that postulate that the [GRDA] must somehow show a grant from the Federal Government"

Respondent accepts this challenge.

Id. at p. 7-8 (emphasis added).

GRDA then set about to prove its chain of title to the waters of the Grand River to the Supreme Court. GRDA attempted to prove State ownership of the water by tracing title from the United States to the State of Oklahoma through a grant to the Cherokee Nation and through an Act of Congress which granted to power and light companies the rights-of-way to build dams in the Indian Territory across non-navigable streams for the purpose of generating power. (Exhibit 2 at p. 8-9). Thus, despite GRDA's arguments in the present case, the central focus of the 1960 Case was whether GRDA had any "vested property rights" in the waters of the Grand River.

ii. The Ruling Of The 1960 Case

Despite having vehemently argued to the Supreme Court that it had a vested property right in the waters of the Grand River that had been appropriated by the United States, GRDA now argues that "the Supreme Court did not decide any property rights issues involving the Grand River." As support for this contention, GRDA cites to the following passage from the Supreme Court's decision in the 1960 Case:

> The Government contends that the navigational servitude of the United States extend to non-navigable waters [of the Grand River], pre-empting state-created property rights in such waters, at least when asserted against the Government. In the view we take in this case,

> however, it is not necessary that we reach this contention. (GRDA Motion at p. 7)

GRDA completely misconstrues the meaning of the above-quoted portion of the Supreme Court's decision.

As stated above, the Court of Claims had noted that if, during the use of the commerce power to regulate navigable streams, private property was taken on a non-navigable stream which is a tributary of the navigable stream, the United States must pay just compensation for the property taken. *GRDA,* 175 F.Supp. at 156. The United States argued to the Supreme Court that the rules applicable to navigable streams (i.e. the United States does not have to compensate for the taking of property rights on a navigable stream) also applied where the United States utilized the commerce power to regulate a tributary (here, the Grand River) to a navigable stream (the Arkansas River). (Exhibit 1 at p. 9-13).

Contrary to GRDA's argument, the above-quoted statement from the 1960 Case did nothing more than indicate that it was not necessary for the Supreme Court to address the United States' contention that the law applicable to takings along a navigable stream (i.e. that no compensation is due for the taking of private property) also applied to a non-navigable stream where the United States exercised its commerce power to regulate the flow of a tributary to a navigable stream. As explained by the Supreme Court later in its opinion, it was unnecessary to address this contention because GRDA had failed to meet its initial burden of proving that any private property had been taken from GRDA.

The Supreme Court agreed with the Court of Claims that the United States had the power and authority to build the Fort Gibson Dam under the commerce power. *United States v. Grand River Dam Authority*, 363 U.S. 229, 232-233 (U.S. 1960). The Court then addressed GRDA's contention that it had a vested interest in the waters of the Grand River pursuant to the grant made by Oklahoma to GRDA. *Id.* at 233. The Court noted that GRDA attempted to trace the title of Oklahoma through a grant from the United States to the Cherokee Nation. *Id.* at 233-234. The Court concluded, however, that if the Cherokee Nation had obtained rights to the water from the United States, none of these rights thereafter passed to the State of Oklahoma. *Id.* at 234. The Court also addressed GRDA's contention that the State received rights to the waters of the Grand River through an Act of Congress which gave light and power companies the right to construct dams across non-navigable streams in the Cherokee territory. *Id.* The Court specifically concluded that "no water rights condemned under this Act are shown to have passed to Oklahoma and from Oklahoma to [GRDA]." *Id.* at 235.

Despite all of its arguments to State ownership of the waters of the Grand River, the Supreme Court concluded that "[GRDA] has done no more than prove that a prospective opportunity was lost. More than that is necessary..." *Id.* at 236. In other words, GRDA had only proven that it had lost a prospective business opportunity but failed to prove that the State had <u>any</u> property interest or ownership interest in the waters of the Grand River. Having failed to prove that the State possessed a property interest in the water of the Grand River (and that GRDA therefore lacked any interest as the State's agent), the Court ultimately

concluded "the United States did not appropriate any business, contract, land, or property of [GRDA]." *Id.* at 236.

The Supreme Court could not make its holding more clear. The effect of its decision was that neither GRDA nor the State of Oklahoma possessed any property interest in the waters of the Grand River. Obviously, if the State of Oklahoma did not possess any property interest in the water of the Grand River, it could not by a boot-strap process of declaring a "legislative appropriation" create greater rights to the Grand River in its agent than the State itself possessed. Any purported property rights that the State attempted to convey to GRDA were nullified by the pronouncement in the 1960 Case. As a result, Plaintiffs have shown their entitlement to the relief requested in their First Amended Complaint and GRDA's Motion to Dismiss should be denied.

B. OKLAHOMA LAW DOES NOT ALLOW GRDA TO CHARGE PLAINTIFFS FOR THE WATER THAT THEY APPROPRIATE

GRDA argues that Oklahoma Law does not support any claim for relief in Plaintiffs' First Amended Petition and that Oklahoma Law establishes Oklahoma's ownership of and GRDA's right to sell Plaintiffs the water in question. To the contrary, Oklahoma Law expressly limits the State's ownership of water to and GRDA's right to sell water from the Grand River and reservoirs along the Grand River that lie upstream from the Fort Gibson Reservoir.

As support for its contention that the State of Oklahoma owns all of the water in the Grand River, GRDA cites to 82 O.S. § 887 which provides:

> That the waters of Grand River in Oklahoma and the Pensacola and Markham Ferry Reservoirs, located thereon, be and are hereby determined and declared to be non-navigable and waters of the State of Oklahoma.

To the extent that this statute is not in conflict with the 1960 Case, it specifically defines which water along the Grand River belongs to the State of Oklahoma. GRDA essentially asserts that all water along the Grand River belongs to the State and therefore, GRDA can sell any water flowing in the Grand River. However, GRDA's interpretation of Section 887 is a stretch.

While GRDA attempts to focus the Court's attention on the "waters of Grand River" language, it conveniently ignores the language regarding the Pensacola and Markham Ferry Reservoirs. The reason GRDA ignores this language is because it reflects a clear intent by the Legislature that the water within the Fort Gibson Reservoir is not "owned" by the State of Oklahoma and is not subject to the control of GRDA.

Section 887 (which is part of the statutes controlling GRDA) was enacted by the Oklahoma Legislature in 1963. By the time of its enactment, the Fort Gibson Reservoir had existed for thirteen years and the 1960 Case had been decided three years earlier. Had the Legislature believed that the water in the Fort Gibson Reservoir was owned by the State of

Oklahoma, the language of the statute would be quite different.

The separate identification of the Grand River and the Pensacola and Markham Ferry Reservoirs indicates that the Legislature considered there to be a distinction between water flowing within the riverbed of the Grand River and water impounded at a reservoir along the Grand River. Had the Legislature intended all water along the Grand River (including water impounded in reservoirs) to be included within its definition of "waters of the State," there would be no need to separately identify the Pensacola and Markham Ferry Reservoirs. The Legislature could have simply listed the waters of Grand River and left out the Pensacola and Markham Ferry Reservoirs. The inclusion of both the waters of Grand River along with these two reservoirs shows that the Legislature was drawing a distinction between water flowing in the Grand River riverbed from water impounded at a reservoir.

The Legislative intent to exclude the Fort Gibson Reservoir from its determination of "waters of the State" is also evident from the fact that the Legislature specifically excluded the Fort Gibson Reservoir from the list of reservoirs along the Grand River that were considered "waters of the State." Obviously, the Legislature knew of the existence of the Fort Gibson Reservoir at the time of the enactment of Section 887, and could have listed it in the statute. The fact that the Legislature omitted the Fort Gibson Reservoir from the statute shows that this water is not owned by the State. Since this water is not owned by the State, GRDA has no legal right to sell it. Clearly, by omitting the Fort Gibson Reservoir, the Legislature intended to

limit the jurisdictional control of GRDA to only that water flowing in the Grand River riverbed and the reservoirs along the Grand River owned and operated by GRDA.

In 1975, the Oklahoma Legislature further clarified the jurisdictional limitation of GRDA to the waters upstream from the Fort Gibson Reservoir when it enacted 82 O.S. § 890 as a part of the statutes governing GRDA. Section 890 provides:

> The Grand River Dam Authority **shall have no control** over that portion of the Grand River downstream from Fort Gibson Dam to the point of confluence of the waters of the Grand River with those of the Arkansas River.

By excluding the water flowing from the Fort Gibson Reservoir from the jurisdictional control of GRDA and by not including the Fort Gibson Reservoir in its determination of what the Legislature deemed "waters of the State," the Legislature limited GRDA's authority to sell water to only the portion of the Grand River and the reservoirs that lie upstream from the Fort Gibson Reservoir. As such, GRDA's Motion to Dismiss should be denied.

C. GRDA HAS NO RIGHT TO CHARGE PLAINTIFFS FOR WATER APPROPRIATED BY PLAINTIFFS BECAUSE THE WATER APPROPRIATED IS NOT CONTROLLED, STORED OR PRESERVED BY GRDA

Pursuant to 82 O.S. § 862, GRDA was granted the right "[t]o control, store and preserve, within the

boundaries of the District, the water of the Grand River and its tributaries for any useful purpose, **and** to use, distribute and **sell the same** within the boundaries of the District. . ." (emphasis added). To the extent that GRDA has any right to sell the water of the Grand River (which Plaintiffs deny in light of the 1960 Case), that right extends only to water that GRDA "controls, stores or preserves." GRDA does not control, store or preserve the water appropriated by the Plaintiffs and has no authority to charge Plaintiffs for the use of this water.

As stated above, GRDA owns and controls the Pensacola Dam and the Markham Ferry Dam along the Grand River. GRDA releases water from the Pensacola Dam and that water flows into the Markham Ferry Reservoir. GRDA then releases the water from the Markham Ferry Dam and that water flows into the Fort Gibson Reservoir which is owned and controlled by 11 the United States acting through the U.S. Army Corps of Engineers. Water is released from the Fort Gibson Dam back into the Grand River and it flows into the Arkansas River. The water leaves the State of Oklahoma and eventually flows into the Gulf of Mexico.

The majority of the Plaintiffs appropriate (for beneficial uses) water from the Fort Gibson Reservoir or from creeks and streams that feed **directly** into the Fort Gibson Reservoir and not into the Grand River. Plaintiff, Peggs, appropriates water from a water well on its own land. GRDA takes no action to control, store or preserve any of the water in Peggs' water well, any of the water impounded by the Fort Gibson Dam or any of the water from creeks or streams that feed directly into the Fort Gibson Reservoir. Any efforts to

control, store and preserve any water below the Markham Ferry Dam are undertaken by the United States through its agent, the Corps of Engineers. Because GRDA does not control, store and preserve the water that Plaintiffs appropriate, it has no right to charge Plaintiffs for the use of this water.

The fact that GRDA does not own the Fort Gibson Dam is also significant under the Oklahoma Water Code. Section 105.21 of the Oklahoma Water Code provides:

> The owner of any works for the storage, diversion or carriage of water, which contain water in excess of his needs for irrigation or other beneficial use for which it has been appropriated, shall be required to deliver such surplus, at reasonable rates for storage or carriage, or both, as the case may be, to the parties entitled to the use of the water for beneficial purposes.

82 O.S. § 105.21

By building the Fort Gibson Dam, the United States undertook the control, storage and preservation of the waters of the Grand River below the Markham Ferry Dam and appropriated these waters for the generation of electricity and flood control. Pursuant to this statute, only the owner of the Fort Gibson Dam may charge appropriators for their use of the water impounded by the Dam. Since GRDA does not own the Fort Gibson Dam, it cannot charge for the water appropriated by the Plaintiffs.

III. PLAINTIFFS ARE ENTITLED TO A DECLARATORY JUDGMENT

GRDA challenges Plaintiffs' right to seek declaratory relief based on its own self-serving interpretation of the 1960 Case. As shown above, not only does the 1960 Case support Plaintiffs' claim for declaratory judgment as to the water in the Grand River, but Oklahoma statutory law supports Plaintiffs' claim for declaratory judgment as to the waters impounded at the Fort Gibson Reservoir and the creeks and streams that feed directly into the Fort Gibson Reservoir.

As an additional basis for dismissing Plaintiffs' declaratory judgment claim, GRDA asserts that there simply is no actual controversy between Plaintiffs and GRDA sufficient to invoke the Court's jurisdiction to grant declaratory judgment. GRDA's argument is grounded on the fallacious premise that Plaintiffs must claim an ownership interest in the waters of the Grand River for there to be a justiciable controversy. However, no such interest is necessary.

The Oklahoma Declaratory Judgment Act, 12 O.S. § 1651 provides in relevant part:

> District courts may, in cases of actual controversy, determine rights, status, or other legal relations. . . The determination may be made either before or after there has been a breach of any legal duty or obligation, and it may be either affirmative or negative in form and effect; provided however, that a court may refuse to make a determination where the judgment, if rendered, would not terminate the

controversy, or some part thereof, giving rise to the proceeding.

"The Declaratory Judgments Act must be liberally construed to obtain its objective to expedite and simplify the ascertainment of uncertain rights." *State ex rel. Bd. of Examiners in Optometry v. Lawton, Okla.*, 523 P.2d 1064 (1974). The nature and purpose of declaratory judgment is to declare rights. *Hyman-Michaels Co. v. Hampton, Okla.*, 471 P.2d 463 (1970).

GRDA requires anyone that appropriates water for beneficial uses from the Fort Gibson Reservoir, from streams or creeks that feed directly into the Fort Gibson Reservoir or from water wells near the Fort Gibson Reservoir to pay GRDA for the water that they appropriate from these water sources. (Exhibit 3 hereto, GRDA website). Each of the Plaintiffs has a contract and/or permit with GRDA which provides for the payment to GRDA for the water that they appropriate. Each contract/permit also provides that if Plaintiffs fail to make payments, GRDA can terminate their service. (Exhibit 4 hereto). Plaintiffs contend that GRDA has no legal right to charge them for the water that they appropriate. This determination is exactly the type of "controversy" the Declaratory Judgment Act was intended to address. It is a determination of legal rights and status and such determination will impact whether Plaintiffs may discontinue payments to GRDA for water that they appropriate without fear of being in breach of some legal duty or obligation to GRDA.

GRDA also asserts that Plaintiffs lack standing to seek a declaration because Plaintiffs are asserting the rights of the United States. Again, GRDA's argument

is based on the fallacious premise that Plaintiffs must assert the rights of whoever owns the water in question. Standing in a declaratory judgment action must be predicated on an interest that is direct, immediate and substantial. *Democratic Party of Oklahoma v. Estep, Okla.,* 652 P.2d 271 (1982). Plaintiffs are not required to prove who owns the water in question for the Court to declare that GRDA does not own the water or that GRDA has no legal right to sell the water to the Plaintiffs. Plaintiffs have the right under Oklahoma Law to use the water in the Fort Gibson Reservoir, from the streams and creeks that feed directly into the Fort Gibson Reservoir and from water wells on their own land that are near the Fort Gibson Reservoir. By statute, Plaintiffs have the right to demand that the United States provide them with any surplus water in the Fort Gibson Reservoir to use for beneficial purposes. Thus, Plaintiffs' right to use the water is clear. Since Plaintiffs have a direct, immediate and substantial interest in using the water in question, they likewise have standing to determine whether GRDA has any right to charge them for the use of this water.

IV. INJUNCTIVE RELIEF AGAINST GRDA IS PROPER

Based on the pronouncement in the 1960 Case that neither GRDA nor the State of Oklahoma has any vested property rights in the waters of the Grand River, Oklahoma Law that limits the control of GRDA to the water in the Grand River and reservoirs that lie above the Fort Gibson Reservoir and because GRDA does not control, store or preserve the water in question, Plaintiffs have a substantial likelihood of success on the merits of their case. Plaintiffs also will

suffer irreparable injury, the equities are balanced in their favor, and there would be no injury to the public interest.

A. LIKELIHOOD OF SUCCESS ON THE MERITS

GRDA contends that Plaintiffs are not entitled to injunctive relief because the 1960 Case does not support Plaintiffs and because Oklahoma Law is contrary to Plaintiffs' position. As shown above, GRDA has misconstrued the holding in the 1960 Case. There is no question that the Supreme Court found that neither GRDA nor the State of Oklahoma possessed any property interest in the waters of the Grand River. Since Oklahoma does not possess a property interest in these waters, it could not by legislative enactment grant to GRDA rights that the State did not itself possess. Additionally, the Oklahoma Legislature has specifically restricted GRDA's control over the Grand River by distinguishing between water flowing in the riverbed and water stored at reservoirs, by omitting the Fort Gibson Reservoir from what is deemed "waters of the State" and by precluding GRDA from controlling any of the water flowing out of the Fort Gibson Reservoir.

GRDA also asserts that it cannot be enjoined where it is performing the duties imposed by valid statutes. This argument fails for two reasons. First, the State cannot grant to GRDA any power which itself does not possess, so any grant of authority to sell the water of the Grand River is invalid. Second, GRDA is selling water that is beyond GRDA's statutory grant of authority to sell in light of the statutes that control GRDA.

i. The State Of Oklahoma Cannot Grant To Its Agency Power Which It Does Not Itself Possess

It is a fundamental principal of agency law that a principal may only do through an agent those things that he may lawfully do personally. *Restatement (Second) of Agency § 17*. A principal may not delegate to his agent or nominee authority which he himself does not possess. *Restatement (Second) of Agency § 20*. "In other words, an 'individual may not create an agent who has greater power than the individual himself possesses.' " *U.S. v. Craig*, 896 F.Supp. 85, 89 (N.D.N.Y.,1995). This rule applies not only in the typical principal-agent context but applies equally to an agency of the government. See *U.S. v. Johns*, 336 F.Supp.2d 411, 420 at n. 9 (M.D.Pa.,2004) ("Although this authority was delegated to an agency, the United States Sentencing Commission, the agent can exercise no greater constitutional power than the principal."); See also, *Grand River Dam Authority v. U.S.*, 175 F.Supp. 153, 158 (CT.CL. 1959) (Judge Whitaker notes in his dissenting opinion that "[GRDA], the state's agent, of course has no greater right than its creator, the State of Oklahoma.")

As noted by GRDA in its Motion, GRDA is a non-incorporated *agency* of the State of Oklahoma created in 1935 pursuant to the Grand River Dam Authority Act, 82 O.S. § 861, *et seq*. GRDA is an agent of the State of Oklahoma created by the State by an Act of the Legislature. GRDA's power and authority is derived from its principal, the State of Oklahoma. The State cannot by legislative action empower its agent, GRDA, with any more or greater authority than the State itself possesses. Because the State of Oklahoma

does not own the waters of the Grand River, it cannot empower GRDA to sell something that it does not own.

ii. GRDA Is Acting Outside Of The Authority Granted To It

As shown above, the Oklahoma Legislature clearly defined what water along the Grand River was deemed "waters of the State of Oklahoma." That definition did not include the water impounded at the Fort Gibson Reservoir. Despite this statute, GRDA has continued to sell water from the Fort Gibson Reservoir. These actions are outside of GRDA's statutory authority and injunctive relief is proper. Thus, Plaintiffs have demonstrated a substantial likelihood of success on the merits.

B. PLAINTIFFS ARE BEING IRREPARABLY HARMED AND THE BALANCE OF THE EQUITIES ARE IN THEIR FAVOR

GRDA argues that Plaintiffs have not been irreparably harmed because Plaintiffs have voluntarily purchased water from GRDA for forty-eight years despite the existence of the 1960 Case. GRDA's contention is wrong for two reasons. First, Plaintiffs were unaware of the 1960 Case until shortly before filing their initial action against GRDA in the Northern District of Oklahoma in November of 2007.[2]

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[2] In a footnote to GRDA's Motion, GRDA claims that this is Plaintiff's "second bite at the apple." This is a baseless argument. GRDA was dismissed from the federal suit on 14th Amendment immunity grounds. No decision on the merits of Plaintiffs' claims was reached in the federal suit. The Court simply found that

Second, Plaintiffs had no choice but to purchase water from GRDA because GRDA controls the permitting process for the taking of any water from the Grand River. (Exhibit 3 hereto, GRDA website). GRDA controls who is allowed to remove water from the Grand River and its tributaries and forces certain large water appropriators (such as Plaintiffs) to pay GRDA for the water that they appropriate. Thus, any assertion that Plaintiffs "voluntarily" paid for water is utterly false.

GRDA also argues that Plaintiffs could at any time cease making payments and pursue damages against GRDA for breach of contract and that money damages would be adequate. For purposes of proving irreparable harm, Oklahoma Courts have determined that "[i]njury is irreparable when it is incapable of being fully compensated for in damages or where the measure of damages is so speculative that it would be difficult if not impossible to correctly arrive at the amount of the damages." *Hines v. Independent School Dist. No. 50, Grant County,* 1963 OK 85, 380 P.2d 943.

Here, the irreparable harm is clear. GRDA is selling water which it does not own and has no right to sell. GRDA controls the appropriation of water from the Grand River and its tributaries. The contracts/permits between Plaintiffs and GRDA provide that if Plaintiffs fail to make payments, GRDA can terminate their service. (Exhibit 4 hereto). In other words, if Plaintiffs stopped paying for water that they appropriate from the Grand River, GRDA would

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Plaintiffs' claims against GRDA could not be asserted in federal court.

terminate Plaintiff's access to this water. The majority of Plaintiffs are water districts which supply water to residences and businesses within rural areas. Plaintiff, Tri-B Nursery, Inc. is a private business that relies heavily on water from the Grand River for the operation of its business. If Plaintiffs ceased paying GRDA for water and GRDA terminated service, Plaintiffs would have no other readily available source of water to serve their customers or to operate their business resulting in damages to Plaintiffs that would be difficult if not impossible to calculate.

GRDA has adopted the position that it will continue to sell water that it does not own despite the Supreme Court's ruling in the 1960 Case and despite clear statutory law that shows that GRDA has no right to sell the water in question. Plaintiffs should not have to pay GRDA for water that it does not own and has no right to sell; however, until this Court enjoins GRDA from forcing the sale of water, Plaintiffs have no choice but to continue to pay GRDA for water or risk the termination of their service. Thus, Plaintiffs' dispute cannot be easily remedied with money damages. An injunction against GRDA is the only way to insure Plaintiffs' continued water service.

C. THE PUBLIC INTEREST WOULD NOT BE HARMED BY THE ISSUANCE OF AN INJUNCTION

GRDA also argues that the issuance of an injunction against GRDA would harm the public interest because GRDA's contracts with its other water customers might be jeopardized. GRDA argues that these other challenges could span years and could unduly jeopardize GRDA' s financial condition as well

as its legislative mandate to control, store, preserve. . . and sell" the waters of the Grand River. GRDA offers no argument as to how Plaintiff's attack on GRDA's legislative mandate will somehow harm the public interest with regard to GRDA's right to sell water from the Grand River. Obviously, the public interest is best served when a State agency is not allowed to sell property that it does not own.

As to the effect on its inancial condition, GRDA's water sales account for less than a percent of its hundreds of millions of dollars of revenue. Why GRDA would sacrifice its ability to continue as a going concern to litigate other challenges to GRDA's right to sell water from the Grand River in light of the decision in the 1960 Case and in light of controlling Oklahoma Law is a mystery; however, if GRDA makes this decision, it does not impact any public interest because it is a decision that GRDA has voluntarily made. The public interest in allowing the citizens of the State to put the waters of the State to beneficial uses greatly outweighs the miniscule effect that the loss of water sales would have on GRDA's bottom line. As a result, an injunction against GRDA is proper.

V. THE STATUTE OF LIMITATIONS IS NOT A BAR TO RECOVERY FOR UNJUST ENRICHMENT

GRDA argues that Plaintiffs' claim for unjust enrichment should be dismissed because the statute of limitations bars recovery under that claim. GRDA contends that Plaintiffs had to bring their claim for unjust enrichment within three years of the decision in the 1960 Case and since they did not, Plaintiffs are barred from seeking unjust enrichment for all

payments made over the past 48 years to GRDA. As support for this contention, GRDA cites to *Lapkin v. Garland Bloodworth, Inc.*, 23 P.3d 9581 (Okla. Civ. App. 2000).

The *Lapkin* case is clearly distinguishable from the facts of the present case. In *Lapkin,* a settlement agreement was reached in a medical malpractice case, and an insurance company made a single payment to settle the case. *Id.* at 961. The settlement monies were paid to the Plaintiff and to the attorneys that had handled the case on a contingency basis. *Id.* The Oklahoma Supreme Court declared the settlement agreement void and the Plaintiff sought to rescind the settlement in another proceeding. Plaintiff repaid the amounts received from the settlement but the attorneys refused to return the monies that they received from the settlement. *Id.* The doctor on whose behalf the settlement proceeds had been paid sued the attorneys for unjust enrichment to recover the sums paid to the attorneys under the void settlement. *Id.* The attorneys asserted the statute of limitations barred recovery; however, the Court found that the claim for unjust enrichment did not begin to accrue until the Supreme Court had declared the settlement void. *Id.* at 962.

Here, GRDA apparently argues that any cause of action the Plaintiffs had against GRDA for unjust enrichment accrued as soon as the 1960 Case was decided, and that Plaintiffs waited more than forty-eight years to assert their claims. The fallacy in this argument is that none of the Plaintiffs were parties to the 1960 Case. Another distinguishing fact is that in *Lapkin,* a single payment was made at a time when the settlement agreement was valid. Here, Plaintiffs

made payments before learning that GRDA lacked the authority to sell the water in the Grand River. Plaintiffs also continue to make payments (under protest) for fear of having their water service terminated. Furthermore, each successive payment to GRDA for water that it does not own gives rise to a new claim for unjust enrichment. Thus, Plaintiffs' unjust enrichment claim is not barred by the statute of limitations.

VI. PLAINTIFFS HAVE NOT FAILED TO JOIN AN INDISPENSABLE PARTY

GRDA also contends that if it does not own the water of the Grand River, all parties that could own an interest in the water should be made parties to this litigation. Although GRDA contends that all parties claiming an interest in the waters of the Grand River should be made parties to this lawsuit, no other parties need be present. No other parties are necessary for this Court to determine that GRDA does not own the water in the Fort Gibson Reservoir, the water in the streams and creeks that feed directly into the Fort Gibson Reservoir or from water wells on land near the Fort Gibson Reservoir. Assuming the Court determined that GRDA had no ownership interest in this water and/or no right to sell this water, that determination would only affect GRDA and not any other party claiming an interest. Likewise, such determination would have no impact on the rights of any third parties to assert their own interest at a later date since GRDA's interest would be the only interest determined.

In a footnote, GRDA cites to *Ellis v. Union Oil Co. of California,* 630 P.2d 306 (Okla. 1981) to support its

contention that indispensable parties have not been joined. *Ellis* does not advance GRDA's argument. In *Ellis,* a riparian landowner sought to quiet title to mineral interests along the Red River. The riparian owner owned land and mineral interests along the southern bank of the Red River and claimed that through the process of accretion the course of the Red River had moved North extending his land and mineral interests northward. *Id.* at 307-308. The United States owned the mineral interests of three lots immediately north and contiguous to Ellis' land and Ellis sought to quiet title to the mineral interests of appellant's land which was North of and contiguous to the lots to of the United States. *Id.* at 309-310. The Court found that mineral inte. ests were subject to loss or gain by the process of accretion. *Id.* at 309. However, the Court found that Ellis had no justiciable claim to the appellant's mineral interests until he established that he had acquired the interest of the United States. *Id.* at 310. Because Ellis could not invoke the doctrine of accretion against the appellant's mineral interests without affecting or clouding the interests of the United States, the United States was found to be an indispensable party. *Id.* at 310.

Here, Plaintiffs are not seeking to quiet title to non-contiguous tracts of land or mineral interests. Instead, Plaintiffs ask the Court (1) to find (in conformance with the 1960 Case and Oklahoma Law) that GRDA has no property interest in and/or no right to sell the water in the Fort Gibson Reservoir, the water in any streams or creeks that flow directly into the Fort Gibson Reservoir or the water in any wells near the Fort Gibson Reservoir, (2) to enjoin GRDA from charging for the use of this water and (3) for GRDA to repay Plaintiffs for charges for water that GRDA had

no right to sell. Unlike the *Ellis* case, Plaintiffs do not seek to acquire any interest that GRDA may have in the water in question, but ask the Court to uphold the Supreme Court's determination that GRDA has no interest and to uphold Oklahoma statutes which restrict GRDA's right to sell only the water in the Grand River and reservoirs along the Grand River that lie above the Fort Gibson Reservoir.

The effect of this suit would not, as GRDA suggests, subject GRDA to multiple suits. Once this Court enters a declaratory judgment, GRDA's rights would be determined and there would be no need for another Court to later re-litigate GRDA's rights because this determination would be binding and conclusive as to GRDA's rights.

Assuming some other party stepped forward later to assert rights to these waters, there would be no impact on GRDA because its rights have already been determined. There are no indispensable parties that need to be joined for GRDA's rights to be determined because such a determination would not impact the rights of any other parties that may claim an interest in the water at issue.

WHEREFORE, above premises considered, Plaintiffs respectfully request that the Court deny GRDA's Motion to Dismiss.

Respectfully submitted,
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